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No. 99-1240

IN THE
Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONERS

JEFFREY S. SUTTON
Counsel of Record
CHAD A. READLER
RONNELL A. JONES
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
Columbus, OH 43215
(614) 469-3855

GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioners

BILL PRYOR
Attorney General of Alabama
ALICE ANN BYRNE
MARGARET L. FLEMING
Assistant Attorneys General
State House
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

LISA HUGGINS
Office of Counsel
University of Alabama System
AB 820, 1530 Third Ave. South
Birmingham, AL 35294
(205) 934-3474

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QUESTION PRESENTED

Do Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, exceed Congress's enforcement authority under section 5 of the Fourteenth Amendment?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 193 F.3d 1214 (1999), and the decision of the United States District Court for the Northern District of Alabama is reported at 989 F. Supp. 1409 (1998).

JURISDICTION

The Eleventh Circuit issued its decision on October 26, 1999, and petitioners filed their petition for a writ of certiorari on January 24, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Title I of the ADA provides in part:

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

42 U.S.C. § 12112(a).

Title II of the ADA provides in part:

> "Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

42 U.S.C. § 12132.

The relevant provisions of Title I and Title II, together with the abrogation provision applicable to both of them, *see* 42

U.S.C. § 12202, are reproduced at Appendix D of this brief.

The Fourteenth Amendment provides in pertinent part:

Section 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT

As this case comes to the Court, all 50 States prohibit government-based discrimination against the disabled and, more, affirmatively require all manner of employment and public-access accommodations designed to provide the disabled with the kind of equal opportunity and dignity that all individuals deserve. *See* App. A. The Federal government, to its credit, does likewise.

The United States Constitution places few if any limitations on the passage of such sensible measures, be they Federal laws applicable to its employees and its services or equivalent State laws. But it does limit the authority of one sovereign to regulate another sovereign's efforts to advance these vital objectives. No State, for example, may impose a money-damages remedy on the Federal government for its mistreatment of a disabled Federal employee. And that is true even though the employee resides in the State, even though all other disabled residents of the State may invoke its civil-rights laws for their protection, and even though the Federal government does not provide a comparable money-damages remedy. The Federal government does not permit, and to our knowledge never has permitted, a State so to abrogate the United States' immunity from suit. In protecting that policy choice, the Constitution leaves such waivers to the National Government and to it alone. As *McCulloch v. Maryland*, 17

U.S. (4 Wheat.) 316 (1819), indicates, even the most muscular view of the Constitution's protection of individual liberties faces structural limitations, whether in the area of age, free exercise, or disability discrimination.

Consistent with a government of "dual sovereigns," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), these structural limitations run in the other direction as well. Much as the Supremacy Clause prevents States from providing Federal employees with injunctive or monetary remedies under State law, the Eleventh Amendment limits Congress's authority unilaterally to impose Federal money-damages remedies on State employers. Save when the States have violated the constitutional rights of their citizens in the past or stand prepared to do so in the future, no such remedial authority exists. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

This constitutional case thus does not turn on whether two governmental remedies for claims of disability discrimination — one State, one Federal — are preferable to one. It instead turns on whether Congress has satisfied the traditional requirements for imposing extra-constitutional obligations on the States. Yet, in enacting Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq*. ("ADA"), and more specifically in enacting the abrogation provision applicable to each title, *see* 42 U.S.C. § 12202, Congress did not comply with these structural requirements.

Alabama does not make this claim lightly. The ADA advances a commendable objective — mandatory accommodation of the disabled — and does so at the end of a lawmaking process that is as deserving of respect as each of the State lawmaking processes that it purports to displace. But the ADA's attempted "expansion of Congress's powers" at the expense of a "corresponding diminution of state sovereignty," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976), would work a

reallocation of the Federal-State balance that in the end would pose more threats to the cause of liberty than it would cure.

Nor has the preservation of this Federal-State balance and these dual lines of accountability been without effect. "[T]each[ing]" by their "example," *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), all 50 States have provisions of their own designed to guard against disability discrimination by the sovereign. *See* App. A. These laws and administrative regulations predate passage of the ADA, far exceed the rational-basis requirements of equal-protection review, *see Schweiker v. Wilson*, 450 U.S. 221 (1981); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Heller v. Doe*, 509 U.S. 312 (1993), all permit monetary relief against the sovereign, and in the end markedly overprotect rather than underprotect the constitutional rights of the disabled. *See* App. A. As one Federal legislator pointedly acknowledged during debates over the ADA: "This is probably one of the few times where the states are so far out in front of the federal government, it's not funny." *Hearing Before the House Subcommittee on Select Education*, 101 Cong. 5 (Oct. 6, 1989) (Rep. Moakley).

On this record, the extra-constitutional requirements of the ADA cannot credibly be justified as permissible section 5 legislation. No pattern and practice of State equal-protection violations exist when it comes to alleged employment or public-access discrimination by State governments. Neither does any tenable threat of future unconstitutional discrimination exist, least of all the kind that would justify imposing this type of legislation on every State in the country or would justify doing so into perpetuity. The legislative record also demonstrates nothing to the contrary. Congress did not show, or even try to show, that the States have previously violated the constitutional rights of the disabled. Accordingly, while States remain free to waive their sovereign immunity from disability-discrimination claims on their own,

Congress cannot in this instance abrogate that immunity for them.

A. History of State Disability Laws.

Disability-discrimination laws are a twentieth century innovation, and a State innovation at that. Before the mid-nineteenth century, most Americans treated disabilities at home if they treated them at all. Social policies for supporting the disabled varied so greatly from place to place that it would be difficult to speak of any uniform approach. As exemplified by an 1849 Wisconsin law, each community coped as best it could under a general obligation to "relieve and support all poor and indigent persons, lawfully settled therein, whenever they shall stand in need thereof." Edward Berkowitz, *Supporting Disability: An Historical Perspective, American Rehabilitation*, Apr. 1, 1999, at 27.

Prompted in part by the large number of veterans returning home from the Civil War, localized movements aimed at rehabilitating rather than just supporting persons with disabilities emerged in the late nineteenth century. *See* Gary L. Albrecht, *The Disability Business: Rehabilitation in America* 97 (1992). Again, however, these efforts — most of them privately sponsored — involved not the creation of legal rights for the disabled but additional mechanisms for supporting and rehabilitating them. For example: In 1889, the Cleveland Rehabilitation Center "began as a program for crippled children" which "gradually oriented toward the problems of the disabled adult as well," W. Scott Allan, *Rehabilitation: A Community Challenge* 7 (1958); in 1893, Boston established a vocational school for disabled children; and in 1897 Minnesota became the first State to make provisions for medical care for disabled children, *see* Department of Vocational Teacher Education, University of Arkansas & Arkansas Vocational Rehabilitation Agency, *History, Philosophy and Principles of Vocational Rehabilitation* 5 (1957). The Curative Workshop of

Milwaukee, begun in 1919, was another early venture into the field of rehabilitation. *See* Allan, *supra*, at 7. By 1920, twelve States had enacted legislation for the vocational training and rehabilitation of disabled citizens. *Id.*

Not until the 1940s, however, did the first laws designed to guarantee access rights for the disabled come into existence. They were State provisions and were known as "white cane" laws. Authored by Jacobus tenBroek, president of the National Federation of the Blind, *see Hearing Before the House Subcommittee on Surface Transportation*, 101 Cong. 293 (Sept. 20, 1989) (James Gashel, National Federation of the Blind), they initially applied just to the visually impaired. To our knowledge, Missouri became the first State to enact such a law in 1941, when it provided that "[a]ny blind person . . . shall . . . be entitled to any and all accommodations, advantages, facilities and privileges of all public conveyances and all places of public accommodations." 1941 Mo. Laws p. 344 § 1 (codified at MO. REV. STAT. § 209.150). Other States soon followed suit and eventually extended the provisions to other disabilities as well. The current Arizona law is typical: "The legally blind, visually impaired, the deaf and auditorially impaired and the physically handicapped have the same rights as all persons to the use of all streets, highways, walkways, common carriers, public lodging places, public eating places, public amusements and other places to which the general public is invited." ARIZ. REV. STAT. § 11-1024 (1990 & Supp. 1999). These State laws represented "[p]erhaps the first attempts to ensure greater access for disabled people through statutory protections." Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* 28 (1984). Today, all 50 States have comprehensive measures guaranteeing the disabled access to public services and places. *See* App. A.

States also marked the initial legislative path in enacting laws barring disability discrimination in the workplace.

Twenty-five years before passage of the ADA, Wisconsin in 1965 enacted a disability-discrimination law applicable to public and private employers. *See* 1965 Wis. Laws ch. 230. Led by Wisconsin's example, other State legislatures soon followed course. By 1980, more than 30 States had enacted such measures. And by 1990, when Congress enacted the ADA, 50 States had passed such laws or regulations. *See* App. A.

Today, all States still have disability-discrimination provisions applicable to public employment. Now, as then, they continue to bar disability discrimination in a variety of contexts (*e.g.*, hiring, terms of employment, discharge), permit injunctive relief, permit monetary-relief claims against the sovereign, cover virtually all forms of public employment, in some instances authorize punitive damages, and in other instances authorize criminal penalties. *See* App. A. Not only do these laws forbid the same types of practices as the ADA, but many of them offer more avenues of relief and contain proactive hiring policies designed affirmatively to attract the disabled to public service. *Id.*

B. History of Alabama Disability Laws.

Like her sister States, Alabama has a long history of providing support, rehabilitation and protection for individuals with disabilities. Three years before the Civil War and ten years before ratification of the Fourteenth Amendment, Dr. Joseph Henry Johnson founded the Alabama School for the Deaf in 1858. Robert Hill Couch & Jack Hawkins, Jr., *Out of Silence and Darkness: The History of the Alabama Institute for Deaf and Blind 1858-1983* 21-32 (1983); *see* Act of Jan. 27, 1860, No. 253, 1859-60 Ala. Acts 344. Nine years later, the State opened the Alabama Academy for the Blind on the same campus. *Id.* at 44; *see* Act of Feb. 18, 1867, No. 490, 1866-67 Ala. Acts 550. The Alabama legislature created the Department of Adult Blind and Deaf in 1939. *See* ALA. CODE § 21-1-15. And in 1955, the Alabama Institute for the Deaf

and Blind began a program for deaf-blind children, later named the Helen Keller School of Alabama. Couch & Hawkins, *supra*, at 178-79. That same year, the State legislature expanded employment opportunities for the visually impaired by establishing Home Industries for the Blind, ALA. CODE § 21-2-1 to -4, and passed a law providing for the operation of vending stands by blind persons in all State owned or leased properties. *See* ALA. CODE § 21-1-40 to -41.

Nor have Alabama's efforts been confined to the visually and hearing impaired. Prompted by the return of veterans from World War I, Alabama like much of the Nation launched additional governmental efforts to support rehabilitation and employment of persons with other disabilities in the 1920s. *See generally* George R. Weir, *Government and the Handicapped: The Alabama Vocational Rehabilitation Program* 3-5 (1960) (describing growth of the Alabama vocational rehabilitation program from the 1920s to 1950s). By the late 1950s, Alabama's vocational rehabilitation program included services for persons with physical disabilities, mental disabilities, and severe disabilities, as well as the deaf and blind. *Id.* at 10-14.

In addition to these efforts, Alabama launched several other initiatives in the 1960s. It enacted legislation giving persons with disabilities preferential treatment in hiring for State employment under the State Merit System. Act of Sept. 30, 1965, No. 119, 1965 Ala. Acts, 2d Ex. Sess. 166 (codified at ALA. CODE § 36-26-16 (1975)). Three years prior to the federal Architectural Barriers Act of 1968, it enacted legislation making all public buildings and facilities accessible to disabled persons. Act of Aug. 9, 1965, No. 224, 1965 Ala. Acts 315 (codified as amended at ALA. CODE §§ 21-4-1 to -7 (1975)). And in 1965, it created the Governor's Committee on Employment of the Handicapped "to promote the employment of the physically, mentally, emotionally, and otherwise

handicapped citizens of Alabama." Act of Aug. 10, 1965, No. 226, § 1, 1965 Ala. Acts 323, 323 (codified at ALA. CODE § 21-5-1 (1975)); *see generally* ALA. CODE §§ 21-5-1 to -10 (1975).

In 1975, after an assassination attempt left Alabama's Governor paralyzed from the waist down, the State enacted other measures codifying the rights of disabled persons. "It is the policy of this State," one such measure said, "to encourage and enable the blind, the visually handicapped and the otherwise physically disabled to participate fully in the social and economic life of the State and to engage in remunerative employment." Act of Oct. 7, 1975, No. 869, § 1, 1975 Ala. Acts 1711, 1711 (codified at ALA. CODE § 21-7-1); *see generally* ALA. CODE §§ 21-7-1 to 21-7-10 (1975). The legislation gave disabled persons additional guarantees of access to public buildings, facilities and property, ALA. CODE § 21-7-2, and declared that persons with disabilities were "entitled to full and equal accommodations, advantages, facilities and privileges of all common carriers" and in all "places of public accommodation." ALA. CODE § 21-7-3. At the same time, the legislation reinvigorated the State's commitment to employing persons with disabilities in the civil service, ensuring that they

> shall be employed in the state service, the service of the political subdivisions of the state, in the public schools and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.

ALA. CODE § 21-7-8. Finally, the legislation made denial of or interference with the rights of disabled persons a criminal misdemeanor. ALA. CODE § 21-7-5.

Today, Alabama residents with disabilities continue to be given preferential treatment in hiring for State employment.

ALA. CODE §§ 21-7-8, 36-26-16. And while the focus of the State's employment laws centers on giving individuals the right to seek a job, not the right to file a lawsuit, the State also provides equitable and monetary remedies to disabled persons who experience employment discrimination by State governmental agencies. Ala. Admin. Code r. 670-x-4-.01, -.03 (1981). A more complete summary of the programs Alabama provides for its disabled residents, including those provided by the University of Alabama, is produced at Appendix B.

C. History of the ADA.

The States have not been alone in addressing these issues. To the National Government's credit, many Federal laws provide support and rehabilitation for disabled individuals, many others create civil rights for the disabled, and still others provide extensive funding for national and local efforts designed to remove barriers to full participation by the disabled in a diverse array of public and private services. *See* App. C.

The first Federal anti-discrimination law regarding the issues presented in this case — employment and access to public services — dates from 1973. In that year, Congress enacted section 504 of the Rehabilitation Act, which prohibited State recipients of Federal funding from discriminating on the basis of disability with respect to employment and access to governmental services. *See* 29 U.S.C. § 794. This Spending Clause legislation, however, did not apply generally to private entities, did not apply to Congress, did not apply to Federal agencies (until 1978), and did not apply to State entities who had not received Federal funding.

In 1990, Congress took a different tack. In enacting the Americans with Disabilities Act, it extended the requirements of the Rehabilitation Act, among others, to private employers and to all States without regard to whether they had received

Federal funding. The Act contains a series of legislative findings, then sets forth prohibitions against discrimination in employment (Title I), public services (Title II), and public accommodations (Title III).

Findings and Purpose. At no point do the statutory findings or purpose indicate that the Act is designed to remediate or deter constitutional violations. While the Act invokes Congress's section 5 and Commerce Clause powers, 42 U.S.C. § 12101(b)(4), the findings do not identify any pattern and practice of State violations of the Equal Protection Clause or for that matter even a single State violation of this or any other constitutional guarantee. The statute itself acknowledges that its purpose is to "enforc[e] the standards established in this chapter," as opposed to the standards established by the Fourteenth Amendment. 42 U.S.C. § 12101(b)(3).

The findings provide that "individuals with disabilities are a discrete and insular minority who have been . . . relegated to a position of political powerlessness in our society." 42 U.S.C. § 12101(a)(7). They analogize disability with age, noting that some 43 million Americans "have one or more physical or mental disabilities," the number of which "is increasing as the population as a whole is growing older." *Id.* at (a)(1). They provide that the disabled have long been subjected to "discrimination" but do not claim that this differential treatment stems from State action, let alone unconstitutional State action. *Id.* at (a)(2-5). They describe several societal problems suffered by the disabled: (1) that "historically, society has tended to isolate and segregate individuals with disabilities," and, "despite some improvements, such forms of discrimination . . . continue to be a serious and pervasive social problem," *id.* at (a)(2); (2) that "census data, national polls, and other studies have documented that people with disabilities . . . are severely disadvantaged socially, vocationally, economically, and educationally," *id.* at (a)(6), and (3) that "unfair and

unnecessary discrimination . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity," *id.* at (a)(9). The findings also identify several aspirational goals regarding treatment of the disabled — among them "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency," *id.* at (a)(8), and to provide "legal recourse" that the disabled often have not had, *id.* at (a)(4).

Employment. Title I of the ADA addresses employment. It prohibits any "covered entity," which is defined to include States, 42 U.S.C. § 12111(2), (5)(A), & (7) (incorporating 42 U.S.C. § 2000e), from "discriminat[ing] against a qualified individual with a disability" with respect to hiring, advancement, discharge, compensation or other terms of employment. 42 U.S.C. § 12112(a). The Act defines "qualified individual with a disability" based on the ability to perform "the essential functions" of the job. 42 U.S.C. § 12111(8). Among other prohibitions, the general rule against discrimination "includes":

(1) "not making reasonable accommodations to the known physical or mental limitations" of an individual that would impose no "undue hardship," 42 U.S.C. § 12112(b)(5)(A);

(2) "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability," *id.* at (b)(3);

(3) "denying equal jobs or benefits" because of the disability of someone with whom the employee or applicant has a relationship or association, *id.* at (b)(4);

(4) "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out" individuals with disabilities, unless the test is "job-related" and "consistent with business necessity," *id.* at (b)(6); and

(5) "failing to select and administer tests concerning employment in the most effective manner to ensure that" they reflect the skills of the applicant rather than "reflecting impaired sensory, manual, or speaking skills," *id.* at (b)(7).

The Act also indicates that prohibited discrimination "shall include medical examinations and inquiries." 42 U.S.C. § 12112(d)(1). In a pre-employment setting, such examinations are permitted only "after an offer of employment." *Id.* at (d)(3). Once the individual becomes an employee, such examinations may not be required unless they are "shown to be job-related and consistent with business necessity." *Id.* at (d)(4)(A).

Each of these requirements is subject to the "enforcement" provisions of Title I. Under that section, a claimant may seek relief against his or her employer under the "powers, remedies, and procedures" of Title VII, which includes authority to seek money damages. *See* 42 U.S.C. §§ 12117(a), 2000e-5. In enacting this provision, Congress purported to abrogate the States' immunity from suit. 42 U.S.C. § 12202.

Access To Public Services. Title II of the ADA applies to "public services" furnished by governmental entities and is divided into two parts. Part A contains a general accommodation provision applicable to any "public entity," which is defined to cover "any State or local government." 42 U.S.C. § 12131(1)(A). The core term — "qualified individual with a disability" — is defined to include individuals

> who, with . . . reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). The accommodation rule then provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Any violation of the provision is subject to the "enforcement" requirements of Title II, which incorporates the "remedies, procedures, and rights" applicable to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, including money damages. 42 U.S.C. § 12133. Congress again purported to abrogate the States' immunity from suit in enacting this provision. *See* 42 U.S.C. § 12202.

Part B of Title II contains extensive provisions regulating public transportation services. These include requirements regarding handicap access to public buses and passenger trains. 42 U.S.C. §§ 12141-12165.

Title III essentially repeats many of the accommodation and access requirements of Title II, but it applies only to private entities. In contrast to Title II, however, the enforcement provision permits only injunctive, not money-damages, relief unless the United States (as opposed to a private litigant) brings the action. *See* 42 U.S.C. § 12188(a), (b).

In 1990, as today, neither Title I nor Title II applies generally to the Federal government. While the Congressional Accountability Act of 1995 extends the provisions of the ADA to both houses of Congress, the ADA still does not apply to the executive-branch agencies of the United States. After the 1978 amendments to the Rehabilitation Act of 1973, to be sure, section 501 of that Act (concerning employment, like Title I of the ADA) and section 504 of that Act (concerning public access, like Title II of the ADA) apply to Federal agencies. Yet the United States permits money-damages actions against Federal agencies only in the context of section 501/employment claims, though not generally in the context of section 504/public-access claims. *See Lane v. Pena*, 518 U.S.

187 (1996). In contrast, the ADA permits money-damages relief against the States under both Title I and Title II and purports expressly to abrogate the States' immunity from suit in doing so. *See* 42 U.S.C. § 12202. It is this attempted abrogation that became the prologue to this dispute.

D. Factual Background

Two claimants filed these actions, one against the Alabama Department of Youth Services, the other against the University of Alabama. In both instances, claimants sought money-damages relief against their State employers and in both instances did so in Federal court.

a. Ash v. Alabama Department of Youth Services. In 1997, Milton Ash filed this action in the Northern District of Alabama, Southern Division, against his employer, the Alabama Department of Youth Services. In doing so, he sought relief for alleged discrimination under Titles I and II of the ADA along with section 504 of the Rehabilitation Act of 1973. According to the complaint, his alleged disability consists of "severe chronic asthma, sleep apnea, obstructive pulmonary disease and diabetes," all of which "limit his ability to . . sleep, breathe, care for himself and work." Joint Appendix ("J.A.") 6.

Mr. Ash began working for the Department in 1993 as a security officer, at which point he allegedly told his employer that he should not be exposed to carbon monoxide or cigarette smoke. J.A. 7. In his view, he was initially discriminated against because his job required him to drive cars that emitted carbon monoxide into the passenger compartment and because the Department did not enforce its no-smoking policy. *Id.* Then, after he complained about these problems, he alleges that the Department retaliated against him — specifically, by just giving him "meets standards" evaluations rather than the "exceeds standards" evaluations to which he had become accustomed and by declining a request to work the day shift to

accommodate his sleep apnea. *Id.* at 8-9. Mr. Ash sought "compensatory and punitive damages" for this alleged discrimination, *id.* at 11, after which the State filed a motion to dismiss on sovereign immunity grounds.

b. Garrett v. The University of Alabama. On January 14, 1997, Patricia Garrett filed this action against her employer, the Board of Trustees of the University of Alabama ("UAB"), in the Northern District of Alabama, Southern Division. She likewise brought the action under Title I and Title II of the ADA and section 504 of the Rehabilitation Act, and also sought relief under the Family Medical Leave Act ("FMLA"). *Id.* at 21.

Ms. Garrett began working at the University of Alabama Hospital, located on the campus of the University of Alabama at Birmingham, in 1977. She started her employment there as a registered nurse and along the way received several administrative promotions. In September 1994, she was diagnosed with breast cancer after which she underwent a lumpectomy followed by radiation and chemotherapy. *Id.* at 39. According to the complaint, this condition "substantially limits her ability to . . . sleep, care for herself and work." *Id.* at 38. When she began undergoing chemotherapy in January 1995, she took intermittent leave under the FMLA and from March 1995 to July 1995 she eventually took full leave under the law. *Id.* at 39-40. Upon her return from family medical leave, Ms. Garrett alleges that the hospital transferred her to a new position with a decrease in salary, then claims that the transfer amounted to discrimination on the basis of disability and a failure to accommodate her disability. *Id.* at 41-42. Ms. Garrett also seeks "compensatory and punitive damages," *id.* at 43, and UAB also filed a motion to dismiss on sovereign immunity grounds.

c. District Court. Presented with two cases involving money-damages claims against "instrumentalities of the State of Alabama," the district court issued a single opinion

addressing each action. *Garrett v. Board of Trustees of the University of Alabama*, 989 F. Supp. 1409 (N.D. Ala. 1998). In the court's view, the ADA exceeded Congress's enforcement power under section 5 of the Fourteenth Amendment because it compelled States to provide equal treatment "by guaranteeing special treatment or 'accommodation' for disabled persons." *Id.* at 1410. As a matter of law, it accordingly dismissed each of the ADA claims in their entirety, and ultimately did the same with respect to the Rehabilitation Act and FMLA claims.

d. Eleventh Circuit. After consolidating the two cases, the court of appeals reversed. "[B]ound" by its prior decision in *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), which addressed the constitutionality of the ADA and the Age Discrimination in Employment Act, the court concluded that the ADA constituted legitimate section 5 legislation.

SUMMARY OF ARGUMENT

Title I and Title II of the ADA cannot be sustained as permissible exercises of Congress's unconditional power to supply a remedy for Fourteenth Amendment violations or of its conditional power to prohibit what the Constitution does not.

1. In purporting to address unconstitutional State discrimination against the disabled, the ADA does not proscribe what the Equal Protection Clause proscribes. Equal protection review of classifications based on disability, like those based on age, requires only that the law "be rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645 (2000). The ADA, in contrast, imposes disparate-impact and mandatory-accommodation rules that have no pedigree in any constitutional setting, whether the claim involves denial of

equal protection based on race, religion, age or disability. While judicial second-guessing of a State's policy choices is virtually non-existent under rational-basis review, the ADA also requires courts to scrutinize all such decisions affecting the disabled and imposes the burden of persuasion on the States in doing so. What the ADEA did for the elderly, the ADA ultimately attempts to do for the disabled, if not more. At a minimum, it "has effectively elevated the standard for analyzing [disability] discrimination to heightened scrutiny." *Kimel*, 120 S. Ct. at 648. Neither Title I nor Title II of the ADA accordingly can be sustained on core section 5 grounds — that they supply a remedy for constitutional violations.

2. The ADA also cannot be sustained as a permissible exercise of Congress's prophylactic authority to ban what the Constitution does not.

a. The law, to begin with, lacks the necessary predicate of a "widespread pattern" of unconstitutional conduct for invoking this unique authority. *Kimel*, 120 S. Ct. at 649 (citing *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 641 (1999) (quotation omitted)). In passing the ADA, Congress did not identify any pattern or practice of unconstitutional State action, or for that matter even a single instance of such conduct. Add to this the fact that all 50 States currently ban public-access and employment discrimination against the disabled, and it becomes clear that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of [disability]" or doing so with respect to public-access accommodations. *Kimel*, 120 S. Ct. at 636.

b. The ADA also independently fails the Court's proportionality requirement. Above all, it is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

Start with the manifest differences between judicial review of an ADA claim and review of an equal-protection claim: (1) The ADA requires individualized case-by-case determinations as to whether a disabled employee is qualified for the job, 29 C.F.R. § 1630.9, 42 U.S.C. §§ 12112(b)(5)(A), 12131(2), 28 C.F.R. § 35.130(b)(7), not "generalization[s]" based on physical and mental capacity, *Heller*, 509 U.S. at 312; (2) the ADA places the burden of proof on States to justify their conduct, 42 U.S.C. §§ 12112(b)(5)(A), (b)(6), not the claimant, *Heller*, 509 U.S. at 319; (3) the ADA prohibits any rule or practice that has a disparate impact unless the State can prove that it is "job-related" or "consistent with business necessity," 42 U.S.C. § 12112(b)(6), while the Constitution permits rules that "in practice . . . result[] in some inequality," *Heller*, 509 U.S. at 320-21, and does so even in the area of race and gender discrimination, *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976); (4) the ADA compels States to provide "reasonable accommodations" for disabled employees unless it "impose[s] an undue hardship," 42 U.S.C. § 12112(b)(5)(A), while the Constitution permits employment decisions based on disability so long as they are rationally based, *City of Cleburne*, 473 U.S. at 444; and (5) the ADA compels the State to make "reasonable modifications" in its public services to accommodate the disabled unless they would "fundamentally alter" the nature of the program, 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7), while the Constitution contains no such requirement, *City of Cleburne*, 473 U.S. at 444. Far from being calibrated to correct rational-basis violations, the ADA borrows from and even extends the constitutional framework associated with discrimination claims based on race, gender or religion. As in *Kimel*, the law represents an impermissibly disproportionate exercise of section 5 authority.

c. Nor has the Court ever upheld a prophylactic exercise of section 5 power in the setting of non-suspect classifications.

Still less has it done so in the context of a congressional record revealing no State equal-protection violations plus the existence of 50 State anti-discrimination provisions, all of them pre-dating the ADA's application to the States. Under these circumstances, the ADA has no more connection to correcting Fourteenth Amendment violations than the Age Discrimination in Employment Act in *Kimel*, the RFRA in *City of Boerne*, the Lanham Act in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Patent Remedy Act in *Florida Prepaid*, or the voting-rights provisions in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

A contrary view not only would abandon precedent but also would have no fathomable stopping point. Only a most unimaginative legislature would be unable to use this theory to nationalize all manner of equal protection, procedural due process, substantive due process, or incorporated Bill of Rights' standards. And any law that is itself rational could fairly be said to curb the risk of irrational State lawmaking in the area. No doubt the Federal government may lead by example in regulating the rights of its own employees, or even more so, by waiving *its* immunity from State-law anti-discrimination actions filed in State court. But it is not the case that self-restraint remains the only restriction that the Constitution's "limited and enumerated powers" (*New York v. United States*, 505 U.S. 144, 156 (1992)) place on Congress's efforts to exercise such broad lawmaking authority over the States.

ARGUMENT

Three lines of constitutional precedent frame this dispute and go a long way to resolving it. The first is that Congress may not use its Commerce Clause powers to abrogate a State's immunity from suit; only a permissible exercise of Congress's enforcement authority under the Fourteenth Amendment may do so. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

The second is that section 5 allows Congress only to remediate or deter constitutional violations; it does not authorize the legislative branch to redefine the right or what comes to the same thing — stack one protective rule upon another in a way that lacks any congruence or proportionality to the underlying constitutional guarantee. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). The third is that classifications regarding the disabled, like classifications regarding the aged, receive rational-basis review, not heightened scrutiny such as legislative distinctions affecting race or gender. *See Heller v. Doe*, 509 U.S. 312 (1993); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

At no point in this case have plaintiffs or the Federal government challenged any of these underlying tenets. Nor, unlike the lower-court proceedings in this case regarding the validity of section 504 of the Rehabilitation Act, do they rely on the Spending Clause to sustain the ADA.

Alabama likewise has not challenged Congress's authority under the Commerce Clause to regulate State employees through the ADA. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Nor has it challenged an individual's authority to bring an injunction action against State officials in Federal court, *see Ex parte Young*, 209 U.S. 123 (1908), or the Federal government's authority to bring a claim for injunctive and monetary relief against States in Federal court, *see Employees of the Dep't of Pub. Health and Welfare v. Missouri Pub. Health Dep't*, 411 U.S. 279, 286 (1973).

In resolving a similar dispute last Term, *see Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000), the Court applied a virtually identical framework. There, as here, the underlying constitutional claim received rational-basis review. There, as here, Congress failed to establish any record of constitutional violations by State governments. And there, as here, all 50 States had laws and regulations of their own

designed to root out precisely such forms of discrimination. Under these circumstances, *Kimel* declined to allow Congress to use its section 5 authority to convert presumptively constitutional classifications based on age into presumptively invalid classifications under the Age Discrimination in Employment Act. A similar conclusion applies to Title I and Title II of the ADA.

I. THE SECTION 5 POWER IS REMEDIAL IN NATURE AND MUST BE EXERCISED CONGRUENT WITH AND PROPORTIONAL TO CONSTITUTIONAL WRONGS.

> "Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1.

> "Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

U.S. Const. amend. XIV, § 5.

By its terms, section 5 combines a broad power (to pass "appropriate legislation") with a broad limitation on that power (to do so only when "enforc[ing] . . . the provisions of this article"). "[T]he same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power." *Kimel*, 120 S. Ct. at 644. Consistent with the "design of the Amendment and the text of § 5," the Court has made clear that the enforcement power is a "remedial" one. *City of Boerne*, 521 U.S. at 519.

In accordance with the remedial nature of section 5, judicial review of enforcement legislation "must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy." *Florida Prepaid*, 527 U.S. at 639 (citing *City of Boerne*, 521 U.S. at 525); *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (section 5 "stand[s] behind," not in front of, the "imperatives" of section 1). The Court then asks

whether the legislation merely bans violations of the Fourteenth Amendment as the Court has defined them, or exceeds those requirements in order correctively to "remedy" past violations or "prevent" future ones.

Congress has "much deference" (*City of Boerne*, 521 U.S. at 536) in the first respect. When passing laws that remedy ongoing State action that itself violates the Fourteenth Amendment, Congress poses no threat to the national separation of powers and specifically "the province of the Judicial Branch . . . to say what the law is," *id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Nor, so long as there is some "proportionality" between the underlying violation and the law's remedy, does such legislation threaten the Federal separation of powers by "contradict[ing] vital principles necessary to maintain" the "balance" between the States and the National Government. *Id.* Accordingly, whether exercising its right to prohibit State action that violates the Fourteenth Amendment, *see, e.g., Ex parte Virginia*, 100 U.S. 339 (1879), to establish a cause of action for violations of the Amendment, *see* 42 U.S.C. § 1983, or to provide a forum for constitutional claims, *see Strauder v. West Virginia*, 100 U.S. 303 (1879), Congress has broad power to legislate in this regard.

Section 5 legislation that prohibits what the Constitution does not, however, is another matter. Such laws invariably present the twin risks of parliamentarian supremacy, in which the legislature assumes plenary authority to define the outer limits of its own power and plenary authority to bend State sovereign functions to its will. "[L]imitations" on the exercise of such potential power "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *United States v. Morrison*, 120 S. Ct. 1740, 1755 (2000). Before upholding such legislation, the Court thus imposes at least two requirements: (1) a predicate

"pattern or practice of unconstitutional conduct," *City of Boerne*, 521 U.S. at 534; *Florida Prepaid*, 527 U.S. at 639-41; *Kimel*, 120 S. Ct. at 648-49; and (2) a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *City of Boerne*, 521 U.S. at 520; *Kimel*, 120 S. Ct. at 644.

II. THE ADA CANNOT BE SUSTAINED AS TRADITIONAL ENFORCEMENT LEGISLATION THAT PROHIBITS CONSTITUTIONAL VIOLATIONS.

A. Alleged Discrimination Against The Disabled Receives Rational-Basis Review.

The Court has applied traditional rational-basis review in at least three equal-protection cases involving the disabled. *See Heller*, 509 U.S. at 321. The first of these cases involved an allegation that the Federal government had discriminated against the disabled in the provision of Medicaid benefits. At issue in *Schweiker v. Wilson*, 450 U.S. 221 (1981), was whether the United States had denied equal protection by giving supplemental social security benefits to individuals in public mental institutions funded under Medicaid while denying benefits to those situated in hospitals that were not Medicaid funded. Claimants argued that the disability classifications triggered heightened scrutiny, and that the law at any rate failed the more modest requirements of rational-basis review. Unconvinced that the Federal law ultimately "classif[ied] directly on the basis of mental health," *id.* at 231, the Court did not "reach" the claim that "heightened" review applied, and accordingly it applied rational-basis scrutiny, *id.* at 230-31.

In doing so, the Court pointed out that the standard did "not allow" it "to substitute . . . personal notions of good public policy for those of Congress." *Id.* at 234. So long as the law advances a rational public objective, the Court would

"disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred." *Id.* at 235. The Court ultimately found the legislative scheme rationally justified by Federal "budgetary constraints" and the view "that Congress should have discretion in deciding how to expend necessarily limited resources." *Id.* at 238-39.

The next case came four years later — this time involving a city. In *City of Cleburne*, 473 U.S. 432, the issue was whether a municipality had violated equal protection by denying a zoning permit requested by a group home for mentally disabled individuals. Claimants again sought heightened review of their claim.

At the outset the Court described the differences between rational-basis review and heightened scrutiny. "The general rule," the Court began, "is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. "When social or economic legislation is at issue," the Court continued, "the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (citations omitted).

In contrast, race and gender receive "heightened" scrutiny because they "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy" and rarely provide a "sensible ground for differential treatment." *Id.* Laws, for example, "distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women." *Id.* at 441. In contrast, the Court noted, it had "declined . . . to extend heightened review to differential treatment based on age" in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). 473 U.S. at 441. "The lesson of *Murgia*," the Court continued, "is that where individuals in

the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441-42. "In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 442.

Against this backdrop, the Court concluded that disability did not "call[] for a more exacting standard of judicial review than is normally accorded economic and social legislation." *Id.* at 442. First, the Court reasoned that "those who are mentally retarded have a reduced ability to cope with and function in the everyday world" and are not "all cut from the same pattern," "rang[ing] from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one." *Id.* at 442. Second, the State and National legislative "response . . . to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Id.* at 443. After cataloguing the broad number of State and Federal laws "singling out the retarded for special treatment," the Court observed: "[t]hat a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable." 473 U.S. at 444.

Third, this national set of legislative initiatives, "which could hardly have occurred and survived without public

support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445. Finally, the Court reasoned that if the "large and amorphous class of the mentally retarded" were treated as "quasi-suspect," "it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others" — including "the aging, the disabled, the mentally ill, and the infirm." *Id.* at 445-46. In the end, as with classifications based on age, the Court indicated that "we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate." *Id.* at 446.

In applying this standard, however, the Court held that each of the conceivable justifications offered by the city for denying the proposed zoning permit "rest[ed] on an irrational prejudice against the mentally retarded." *Id.* at 450. Accordingly, the Court invalidated the city's application of its zoning requirement.

Eight years later, *Heller v. Doe*, 509 U.S. 312 (1993), adhered to this same framework in addressing a challenge to the different procedures that Kentucky used for involuntary civil commitment proceedings for those alleged to be mentally retarded and for those alleged to be mentally ill. As to the former, the burden of proof for involuntary commitment was clear and convincing evidence, while for the latter it was proof beyond a reasonable doubt. In addressing claimants' arguments that these distinctions violated equal protection, the Court initially rejected their efforts to apply heightened scrutiny. Although claimants had prevailed below and thus attempted to present an alternative ground for affirmance, the Court held the argument was "not properly presented" and proceeded to decide the "case as it has been presented" to the lower courts. *Id.* at 319.

In applying rational-basis review, *Heller* reaffirmed the difficulty of invalidating legislation on this ground. The law in such cases is not only accorded "a strong presumption of validity," *id.*, but the attacking party must "negative every conceivable basis which might support it," and the courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends," *id.* at 320-21 (quotation omitted). Such "'[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* at 320 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)). Accordingly, even though the classification "in practice . . . results in some inequality," it will be upheld in view of the fact that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations." *Id.* at 321 (quotations omitted).

Other decisions in other settings confirm that rational-basis review remains "a paradigm of judicial restraint," and, where applicable, makes State and Federal action "virtually unreviewable" under the Constitution. *Beach Communications*, 508 U.S. at 314, 316. Neither must the government "actually articulate at any time the purpose or rationale supporting its classification," *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992), as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification," *Beach Communications*, 508 U.S. at 313. These decisions demonstrate that government rarely violates the Constitution by treating individuals differently on the basis of disability. If employment decisions subject to rational basis review need only be justified by *some* rational justification after the fact, *see, e.g.*, *id.* at 313-15; *Nordlinger*, 505 U.S. at 16-18, and if "government[] consideration[s]" of disability "in the vast majority of situations is not only legitimate but also desirable," *City of Cleburne*, 473 U.S. at 444, then it is the rare

classification based on disability that would rise to the level of a constitutional violation.

B. Judicial Review Under The ADA Is Far More Rigorous Than It Is Under The Equal Protection Clause.

By any measure, it cannot tenably be argued that the ADA and the Equal Protection Clause apply the same level of scrutiny to alleged discrimination against the disabled. According to the Court, legislative decisions in this area receive rational-basis review, and will not be invalidated unless they are "palpably arbitrary" and no conceivable set of facts supports them. *Nordlinger*, 505 U.S. at 18. Yet, according to Congress's purported efforts to enforce that provision, the ADA provides that unlawful "discrimination" includes (1) refusing to make all "reasonable accommodations" for the disabled that fall short of an "undue hardship," 42 U.S.C. § 12112(b)(5)(A), (2) using employment standards "that have the effect of discrimination," 42 U.S.C. § 12112(b)(3)(A), and (3) refusing to make "reasonable modifications" in its public services to accommodate the disabled unless they would "fundamentally alter" the nature of the program, 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7).

These disparate-effect and reasonable-accommodation requirements far exceed the minimal strictures of rational-basis review. To illustrate, look no further than the facts of these two cases. In his complaint, Mr. Ash acknowledges that his alleged disabilities "limit his ability to . . . work," J.A. 6, while Ms. Garrett likewise admits that her cancer "limits her ability to . . . work," J.A. 22. On these facts, a motion to dismiss an equal protection claim would be compelled. However difficult the factfinding and policy implications of an employment decision in this area, it is not difficult to conclude that an employer acts rationally — and therefore constitutionally — by refusing to promote or hire individuals

on the ground that they have a medical condition that "limits" their ability "to work." Yet it is precisely the objective of the ADA to regulate such employment decisions, to make them presumptively impermissible, and to allow them only when they can be justified by "necessity." In this respect, the ADA not only goes further than rational-basis review but also exceeds even the requirements of the Age Discrimination in Employment Act, which does not by its terms contain a disparate-effects test and which the Court has already found "is inconsistent with" and "significantly different" from "rational basis" review. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 421-22 (1985); *Kimel*, 120 S. Ct. at 647.

The ADA thus cannot be justified on the ground that it asks the States merely to do what the Equal Protection Clause already requires. Far from applying the same standards of care, the two mandates are worlds apart in their substantive rules, allocation of the burden of proof, system of adjudication and ultimate application. To respect the one standard of review invariably slights the other. As in *Kimel*, "[t]he Act, through its broad restriction on the use of [disability] as a discriminating factor, prohibits substantially more state employment [and public-access] decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 635.

III. THE ADA IS NOT "PROPER PROPHYLACTIC" LEGISLATION.

A. The ADA Does Not Respond To A "Predicate" Pattern Of Unconstitutional State Action.

"[P]roper prophylactic section 5 legislation" must fairly anticipate or "respond to a history of 'widespread and persisting deprivation of constitutional rights.'" *Florida Prepaid*, 522 U.S. at 645 (quoting *City of Boerne*, 521 U.S. at 526). *See Kimel*, 120 S. Ct. at 649 ("it is sufficient for these cases to note that Congress failed to identify a widespread

pattern of age discrimination by the States"). The ADA, however, does no such thing. Whether one considers *prior* equal protection violations or potential *future* ones, the congressional record is conspicuously silent in either direction.

Congress did not identify a pattern of prior State constitutional violations. A brief review of the text and legislative record of the ADA confirms that it does not even pretend to "respond" to State action, to say nothing of unconstitutional State action, but instead turns entirely on Article I policy concerns. One searches in vain for the "predicate unconstitutional conduct that Congress intended to remedy" by extending the ADA to the States in 1990. *Florida Prepaid*, 527 U.S. at 647.

The text of the ADA, to begin with, makes no mention of any pattern of State violations of the equal-protection rights of the disabled. Not one instance of such conduct is identified, whether in the findings and purpose section of the law or in any other Title of the Act.

The legislative record is no different. Far from reflecting State insensitivity to the equal-protection rights of their citizens, the legislative record of the ADA "acknowledg[es] that states are willing and able to respect [the employment and public-access] rights" of the disabled. *Florida Prepaid*, 527 U.S. at 640 (quotation omitted). At several instances during the hearings on the ADA, national legislators and others complimented State efforts in this area:

* "All but one State I believe now, at the most recent count, has some kind of disability rights protection." *Hearing Before the House Subcommittee on Employment Opportunities*, 100 Cong. 86 (June 17, 1987) (Barbara Hoffman, Esq., Coalition for Cancer Survivorship).

* "Forty-five States have very similar laws as the one we are trying to put on the books here in the Federal Government." *Id.* at 5 (Rep. Moakley).

* Stating that 35 States already have legislation prohibiting discrimination and promoting accessibility. *Hearing Before the House Subcommittee on Select Education*, 101 Cong. 8 (Aug. 28, 1989) (Rep. Bartlett).

* "[T]he fact is that many States already provide this protection. This bill enables the whole country to be governed under the same conditions as those States that have had the foresight to pass such legislation." *Hearing Before the House Subcommittees on Employment Opportunities and Select Education*, 101 Cong. 1 (Sept. 13, 1989) (Rep. Martinez).

* "Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination." S. Rep. No. 101-116, at 84 (1989).

* "All states currently mandate accessibility in newly constructed state-owned public buildings . . . ." *Id.* at 92.

* "Federal action in this area should likewise recognize that States can act, and most have already acted, to protect the rights of persons with disabilities in ways tailored to each State's particular circumstances." *Hearing Before the Senate Subcommittee on the Handicapped*, 101 Cong. 196 (June 22, 1989) (Attorney General Richard Thornburgh).

* "A large majority of the states (45) prohibit this type of discrimination." *Hearing Before the House Subcommittee on Employment Opportunities*, 101 Cong. 16 (June 17, 1987) (Congressional Research

Service Survey) (also noting that just six States do not have a general prohibition against discrimination, but that five of those States have a policy of employing handicapped persons in State service) (including table of State statutes).

* "Every state has a law that, to some extent, regulates employment decisions based on disability." *Hearing Before the Senate Subcommittee on the Handicapped*, 101 Cong. 386 (May 9, 1989) (National Coalition of Cancer Survivorship).

In addition to recognizing the innumerable State laws designed to accommodate and protect the disabled, other legislators observed that the States had been leaders rather than recalcitrant followers in this area. As Representative Mario Biaggi testified: "It is a sad commentary on the Congress of the United States when you see so many states in the vanguard, who long since have established more humane policy in this area." *Hearing Before the House Subcommittee on Employment Opportunities*, 101 Cong. 7 (June 17, 1989). And Representative John Moakley echoed the point: "This is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny." *Id.* at 5. Still others suggested that the ADA was modeled after State anti-discrimination laws. *See* 136 Cong. Rec. H2614 (daily ed. May 22, 1990) (Rep. Berman) ("States like California, Pennsylvania, New York, North Carolina, Massachusetts, Connecticut, Iowa, Illinois, and others have offered models on which many aspects of the ADA are based").

Why, then, did Congress extend the ADA to the States as opposed merely to making it applicable to private employers? To the extent Congress gave any explanation for the decision, it did not relate to remediating Fourteenth Amendment violations. One legislative concern was ensuring that public sector employees obtain the same protections that private sector employees receive. *See* 135 Cong. Rec. S4993 (daily

ed. May 9, 1989) ("The Americans With Disabilities Act applies to both the public sector and the private sector. It prohibits discrimination on the basis of disability in employment, public accommodations, transportation, and communications. Its goal is nothing less than to give every disabled American a fair share of the American dream.") (Sen. Kennedy); *Hearing Before the House Subcommittee on Surface Transportation*, 101 Cong. 304 (Sept. 26, 1989) (Rep. Rahall). Yet, as the Court has held, an effort to level the regulatory requirements applicable to public and private employers represents a Commerce Clause, not a Fourteenth Amendment, concern. *See Florida Prepaid*, 527 U.S. at 645-48 (goal of "plac[ing] States on the same footing as private parties" is a "proper Article I," not section 5, "concern[]").

Another concern was addressing a history of societal discrimination against the disabled. In its statement of legislative findings, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination . . . continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). The legislative history conveys similar concerns. *See, e.g., Hearing Before the House Subcommittee on Civil and Constitutional Rights*, 101 Cong. 418-19 (Oct. 12, 1989) (James Ellis, American Association on Mental Retardation). But a finding of "discrimination in the private sector is beside the point," *Kimel* makes clear, because it does not show unconstitutional "discrimination by the States." 120 S. Ct. at 649 (citation omitted); *see also Morrison,* 120 S. Ct. at 1757-58 (section 5 legislation "must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of [s]tate officers") (quoting *Civil Rights Cases*, 109 U.S. 3, 18 (1883)).

An additional concern was ensuring that State agencies not covered by the Rehabilitation Act (because they do not receive

Federal funding) be covered by a Federal disability law. *See, e.g., Hearing Before the House Committee on the Judiciary and Subcommittee on Civil and Constitutional* Rights, 101 Cong. 58 (Aug. 3, 1989) (Chai Feldblum, ACLU Legislative Counsel) (noting that most programs and activities of States are already covered by section 504 when Federal funds are received, but that Title II of the ADA will extend the same coverage to the rest of the State activities); *Hearing Before the House Subcommittees on Employment Opportunities and Select Education*, 101 Cong. 1 (Sept. 13, 1989) (Rep. Martinez) ("the fact is that many states already provide this protection. This bill enables the whole country to be governed under the same conditions as those states that have had the foresight to pass such legislation"). Again, however, these policy considerations at best represent Commerce Clause concerns, not indications that the States have been violating, or stand prepared to violate, the constitutional rights of their disabled citizens.

In a similar vein, other participants in the legislative debate expressed concern that the various State laws in this area did not contain all of the substantive requirements that the ADA contains. *Id.* at 18; *Hearing Before the House Subcommittee on Employment Opportunities,* 100 Cong. 55 (June 17, 1987) (Grace Powers Monaco, Esq.) (noting that most State laws do not include cancer as a handicap); *Hearing Before the Senate Subcommittee on the Handicapped and House Subcommittee on Select Education*, 100 Cong. 54 (Sept. 27, 1988) (Admiral James Watkins) (recommending that States amend their disability laws to prohibit discrimination against the disabled, including HIV infected persons and persons with AIDS). This explanation, though, reveals not a constitutional but a policy concern, and it is one at any rate that is amply satisfied by the unchallenged authority of Congress to extend the ADA's substantive provisions (though not its abrogation provision, *see* 42 U.S.C. § 12202) to State employers under the Commerce Clause.

Still others expressed diverse concerns about the importance of accommodating the disabled in view of the aging American population, *Hearing Before the House Subcommittee on Select Education*, 101 Cong. 36-37 (Oct. 6, 1989) (Janna Shishler), the fact that one disability or another ultimately affects every family if not every American, and the economic benefits of accommodating disabled individuals, *Hearing Before the House Subcommittees on Employment Opportunities and Select Education*, 101 Cong. 41 (Sept. 13, 1989) (Mark Donovan, Marriott Corporation) ("Accommodation is not a disability issue. Accommodation is an employment issue . . . ."); 136 Cong. Rec. H2276 (daily ed. May 15, 1990) (Rep. McDermott) ("The ADA will not just help the disabled. It will help everyone, by giving America's economy the full benefit of their productive energies and talents."); H.R. Rep. No. 101-485, at 43-45 (1990). These objectives, too, advance Commerce Clause goals, and at the same time confirm the parallels between Congress's extension of the ADEA to the States and its comparable decision to do so with regard to the ADA.

Nor does the legislative history reveal any discussion of what the Constitution requires in this area or how the ADA is designed to meet those requirements. To the extent Congress mentioned the constitutional rights of the disabled, it was to argue that the 43 million disabled individuals in this country (42 U.S.C. § 12101(a)(1)) should be treated as "a discrete and insular minority," 42 U.S.C. § 12101(a)(7), S. Rep. No. 101-116, at 15 (1989), H.R. Rep. No. 101-485, at 40 (1990), or should receive the same "civil rights protections that women and other minority groups have." *Hearing Before the House Committee on the Judiciary and Subcommittee on Civil and Constitutional Rights*, 101 Cong. 41 (Aug. 3, 1989) (James Brady, National Organization on Disability); *Hearing Before the House Subcommittee on Employment Opportunities*, 101 Cong. 3 (June 17, 1987) (Rep. Moakley).

> [The Court has] consigned cases involving disability discrimination to the level or 'tier' of judicial scrutiny least favorable to the individual who suffers the discrimination — the so-called 'rational basis' test. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). What this means in practical terms is that any halfway plausible rationalization for governmental discrimination against people with mental or physical disabilities will be enough to satisfy the Federal courts.

Hearing Before the House Committee on the Judiciary and Subcommittee on Civil and Constitutional Rights, 101 Cong. 422-23 (Oct. 12, 1989) (James Ellis, President, American Ass'n on Mental Retardation). While these disagreements over the appropriate constitutional scrutiny for disability discrimination may be permissible justifications for Commerce Clause legislation, they do not reflect the "specially informed *legislative* competence" that section 5 entrusts to Congress, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (emphasis added), and disrespect the inter-branch imperative that "it is this Court's precedent," not Congress's view of that precedent, "which must control." *City of Boerne*, 521 U.S. at 536. "Congress does not enforce a constitutional right," it is by now clear, "by changing what the right is." *Id.* at 519.

Congress did not identify any threat of future State constitutional violations. Nor does the future look any more threatening than the past. To our knowledge, Congress nowhere expressed any such concern, whether in the text of the law or in the legislative record. Nor can any such threat be contrived today.

Besides being governed by democratically-elected officials sworn to uphold the Constitution of the United States, all 50 States have laws or administrative provisions restricting disability discrimination in employment and public access. *See* App. A. These provisions go beyond what the Constitution requires, they each apply generally to public

employees, and they each permit monetary relief. *See id.* Under these circumstances, only the most unusual sequence of events would allow a future constitutional violation to go unremedied. Consider the necessary prerequisites of such a development: (1) The State or Federal lower courts would have to deny relief on equal protection grounds; (2) this Court would have to deny relief on equal protection grounds; (3) the State courts would have to deny equal-protection relief under their own Constitution; (4) the States would have to deny judicial or administrative relief under their comprehensive State disability laws; (5) the State agency would have to deny, or be ineligible for, Federal funding (because otherwise the comparable injunctive and monetary remedies of the Rehabilitation Act would be available); (6) the States would have to decline to waive immunity to ADA claims in State court; (7) the Federal courts would have to deny *Ex parte Young* relief under the ADA in Federal court; (8) the Federal government would have to choose not to sue the State under the ADA for money damages in Federal court; and (9) the "Constitution['s] presum[ption] that . . . even improvident decisions will eventually be rectified by the democratic process," *Vance v. Bradley*, 440 U.S. 93 (1979), would have to fail. No doubt, anything can happen. But if it did under this sequence of events, State recalcitrance to the dictates of the Constitution would hardly be the reason.

All things considered, in "enacting the [ADA], Congress identified no pattern of [age discrimination] by the States, let alone a pattern of constitutional violations." *Florida Prepaid*, 527 U.S. at 640. And as in *Kimel*, "Congress's failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." 120 S. Ct. at 650. Whether one looks backward in time or forward, in neither direction is there a congressionally-identified pattern of unconstitutional State action against the disabled. The only real evidence — evidence, incidentally, of

which Congress was made aware — was of States overprotecting the constitutional rights of the disabled, not undermining them. The legislative record, as in *Kimel*, *Morrison*, *Florida Prepaid* and *City of Boerne*, "contains no evidence that unremedied [disability discrimination] by States had become a problem of national import." *Florida Prepaid*, 527 U.S. at 640-41. The predicate of prophylactic section 5 legislation in short is missing, and for this reason alone the ADA's extra-constitutional requirements exceed Congress's Fourteenth Amendment authority.

Nor would such a decision "signal the end of the line for employees who find themselves subject to [disability] discrimination." *Kimel*, 120 S. Ct. at 650. All 50 States provide some form of remedy for such discrimination, and importantly all go much further — by enacting proactive measures that go well beyond protecting the bare minimums of constitutionality. *See* App. A.

B. The ADA Independently Fails The Proportionality Requirements Of Section 5.

Even if the condition of relevant State misconduct could somehow be established, the ADA would still exceed congressional power. The law is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

The ADA's application to the States carries one hallmark after another of unvarnished policy-based legislation, as opposed to calibrated remedial legislation. For starters, the law's substantive provisions apply in equal measure to State and private employers, 42 U.S.C. §§ 12111(2), (5) and (7), 12131, 12132, even though the Fourteenth Amendment covers the former but not the latter. Above and beyond their separate oath to obey the Constitution, public employers accountable to the ballot box operate under different economic and social

pressures from private employers accountable to dividend-anxious shareholders. Worse, even though the substantive provisions of the ADA apply in equal measure to private employers, the remedial provisions do not. In particular, the Title II public-access provisions permit money-damages claims against the States, 42 U.S.C. § 12133, while the Title III public-access provisions applicable to private employers permit only injunctive relief when a private claimant brings the action. 42 U.S.C. § 12188(a)(1) and (b)(1)(B), 2(B).

This same differential treatment occurs with respect to public-access claims brought against the States as opposed to those brought against the Federal government. Under Title II, to repeat, Congress imposed money-damages remedies on the States. Yet the ADA does not even cover executive-branch agencies, and section 504 of the Rehabilitation Act, the counterpart to Title II of the ADA, does not do so either. *See* 29 U.S.C. § 794a(a)(2) (applicable only to "Federal providers" of assistance, not to executive-branch agencies generally); *Lane v. Pena*, 518 U.S. 187 (1996); *see also* 136 Cong. Rec. H2319 (daily ed. May 15, 1990) (Rep. Douglas) ("The gentleman is right, the Federal Government is the biggest employer in the United States. And guess who is specifically exempt from this law? The Federal Government — the U.S. Federal Government."). Surely the ADA cannot be deemed a proportionate response to alleged national discrimination against the disabled when the constitutional standard applies in equal measure to State and Federal employers, *see Bolling v. Sharpe*, 347 U.S. 497 (1954), but the effort to enforce that standard does not.

The "indiscriminate scope" of the ADA also confirms that it is anything but a proportionate response to an alleged constitutional problem. *Kimel*, 120 S. Ct. at 650. Title I applies to all State "job application procedures" as well as "the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and

privileges of employment." 42 U.S.C. § 12112(a). And Title II applies to all "services, programs, or activities" of any State or State agency. 42 U.S.C. § 12132. This exceedingly broad language leaves little if any State practice unaffected. While this coverage of virtually every State policy decision affecting the disabled might be justified in the context of a law that merely imposes remedies for constitutional violations, it hardly represents the kind of carefully-gauged response that this Court has required of the National Legislature when it imposes extra-constitutional requirements on the States. Because the law is so "expansive" in scope and is not "limit[ed] . . . to cases involving arguable constitutional violations," it cannot satisfy this Court's proportionality requirement. *Florida Prepaid*, 527 U.S. at 646.

Besides the virtually unlimited State policies and practices that the ADA covers, it also is of "indefinite" duration and is nationwide in application. *Florida Prepaid*, 527 U.S. at 647. The same defects doomed the ADEA, the Patent Remedy Act and the RFRA. Unlike the voting rights measures previously approved by the Court, moreover, the ADA does not require the legislature to assess in a remedial manner the progress States are making in curing or ending allegedly unconstitutional practices. *City of Boerne*, 521 U.S. at 532-33. Nor, unlike other voting rights measures, *see Katzenbach v. Morgan*, 384 U.S. 641, is the law "directed only to the State where the evil found by Congress existed." *Morrison*, 120 S. Ct. at 1759.

Above all else, however, "it simply cannot be said that 'many of [the state actions] affected by the congressional enactment have a significant likelihood of being unconstitutional.'" *Florida Prepaid*, 527 U.S. at 647 (quoting *City of Boerne*, 521 U.S. at 532). The rigorous standard of review applicable to an ADA action has no parallel to the forgiving standard that the Court applies to equal protection claims. What the Court said in *Kimel* applies with equal

conviction here: "The Act, through its broad restriction on the use of [disability] as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 120 S. Ct. at 635.

ADA litigation contrasts with constitutional litigation at every turn:

(1) The ADA requires individualized case-by-case determinations as to whether a disabled employee is qualified for the job, 29 C.F.R. Part 1630, Appendix (Interpretive Guidance); *see also* Equal Employment Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act*, §§ 2.2(c), 3.7, 4.4, 4.5, 8.7, and 9.1, not "generalizations" based on physical and mental capacity, *Heller*, 509 U.S. at 312;

(2) the ADA places the burden of proof on States to justify their conduct, 42 U.S.C. §§ 12112(b)(5)(A), (b)(6), not the claimant, *Heller*, 509 U.S. at 319;

(3) the ADA presumptively bars consideration of disability in providing public services or in employing civil servants, but the Constitution permits "governmental consideration of those differences in the vast majority of situations," *City of Cleburne*, 473 U.S. at 444;

(4) the ADA prohibits any rule or practice that has a disparate impact unless the State can prove that it is "job-related" and "consistent with business necessity," 42 U.S.C. § 12112(b)(6), but the Constitution permits such rules that "'in practice . . . result[] in some inequality'" unless the attacking party can "negative every conceivable basis which might support it," and the courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends," *Heller*, 509 U.S. at 320-21 (quotation omitted);

(5) the ADA compels States to provide "reasonable accommodations" for disabled employees unless it "impose[s] an undue hardship," 42 U.S.C. § 12112(b)(5)(A), while the Constitution permits employment decisions based on disability so long as they are rationally based, *City of Cleburne*, 473 U.S. at 444;

(6) the ADA compels States to make "reasonable modifications" in their public services to accommodate the disabled unless they would "fundamentally alter" the nature of the program, 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7), *see Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), while the Constitution contains no such requirement, *City of Cleburne*, 473 U.S. at 444;

(7) employment standards amount to impermissible conduct if they "have the effect of discrimination," 42 U.S.C. § 12112(b)(3)(A), or "tend to screen out" disabled individuals, 42 U.S.C. § 12112(b)(6), while the Constitution does not turn on such effects, *City of Cleburne*, 473 U.S. at 444;

(8) the ADA requires an objective justification in a court of law, 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) & (6), 12113(a) and (b); 29 C.F.R. §§ 1630.2(p) and (r), 1630.9(a), 1630.15, not a "virtually unreviewable" justification (*Beach Communications*, 508 U.S. at 316) that could "reasonably be conceived to be true," *Bradley*, 440 U.S. at 111; and

(9) the ADA frequently requires proof that there is no acceptable alternative with less discriminatory impact, *see, e.g.*, 29 C.F.R. Part 1630, Appendix (Interpretive Guidance) Background ("[a]n accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions"); *id.* at § 1630.9 ("Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position.");

EEOC Technical Assistance Manual to Title I, §§ 4.4 (agility testing), and I (p.I-6) (direct threat); 28 C.F.R. § 35.130(b)(1)(ii) & (iii); U.S. Department of Justice, Technical Assistance Manual to Title II, § II-3.4400, not the recognition that the Court "'must disregard' the existence of alternative methods of furthering the objective" that might be "'preferred,'" *Heller*, 509 U.S. at 330 (quoting *Schweiker*, 450 U.S. at 235).

Far from being calibrated to correct rational-basis violations, the ADA borrows many of the same requirements associated with the heightened scrutiny applicable to discrimination claims based on race or gender. The law, in this respect and many others, represents an impermissibly disproportionate exercise of section 5 authority. As these outcome-dispositive distinctions make clear, Congress ultimately placed disability-based classifications, which are presumptively constitutional, on a par with race-based and gender-based classifications, which presumptively are not. As in *Kimel,* the ADA simply replaces one level of judicial scrutiny with another, and does so out of all proportion to any real or threatened constitutional wrongs. For this independent reason, the law exceeds Congress's section 5 authority.

IV. THE CONCLUSION THAT THE ADA EXCEEDS CONGRESSIONAL POWER FITS WELL WITHIN THE COURT'S SECTION 5 HOLDINGS, AND PRESERVES VITAL PRINCIPLES OF FEDERALISM.

Not just the language of this Court's section 5 precedents, but the holdings as well, establish that the ADA does not constitute proper enforcement legislation. Even with respect to the central evils addressed by the Civil War Amendments — race and voting — the Court has always required congressional authority in this area to be linked to actual or empirically-threatened violations of the underlying amendment. Common sense and logic ought to suffice to

reject the paradoxical exercise of a prophylactic power in an unprophylactic setting. But if not, precedent does. No holding of the Court supports the use of prophylactic authority under section 5 in the context of rights that warrant rational-basis review. And at least two decisions have rejected any such authority.

Thirty years ago, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court confirmed that Congress does not have "a substantive, non-remedial power under the Fourteenth Amendment," *City of Boerne*, 521 U.S. at 527, and did so in the context of a non-suspect classification regarding voting. A majority of the court concluded that Congress exceeded its section 5 authority in passing legislation designed to lower the voting age from 21 to 18 in State and local elections. *See Oregon*, 400 U.S. at 125 (Black, J., plurality opinion); *id.* at 154, 209 (Harlan, J., concurring/dissenting opinion); *id.* at 294, 296 (Stewart, J., concurring/dissenting opinion joined by Burger, C.J., and Blackmun, J.). In doing so, *Oregon* emphasized that "[t]he Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people." *Id.* at 126-27 (citations omitted).

Just last Term, the Court adhered to this view in a case that is virtually identical to this one. In *Kimel*, the Court indicated that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" 120 S. Ct. at 645 (quoting *City of Cleburne*, 473 U.S. at 440). It therefore reiterated that classifications based on age receive rational-basis review, and accordingly that "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the

State's legitimate interests," and may do so even though this proxy "is probably not true . . . in a majority of cases." *Id.* at 646-47 (quotation omitted). Against this backdrop, the Court concluded that the ADEA's attempted imposition of "heightened scrutiny" on State employers could not be sustained. *Id.* at 648. As a matter of logic and sheer common sense, a similar conclusion follows here. Not only do the same explanations for applying rational-basis review to classifications based on age apply to classifications based on disability, but the ADA's extra-constitutional requirements reach as far as, if not further than, those imposed by the ADEA. The absence of abrogation authority in the one rational-basis setting applies with equal force in the other.

Even outside the arena of non-suspect classifications, *City of Boerne*, *Florida Prepaid*, and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), all invalidated legislation that did not respond to a pertinent record of constitutional violations and that was disproportionate to any alleged harm. While the defenders of RFRA, as here and as in *Florida Prepaid* and *College Savings*, argued that it was "a reasonable means of protecting the free exercise of religion," and was designed "[t]o avoid the difficulty of proving such violations," *City of Boerne*, 521 U.S. at 529, the Court nonetheless concluded that the law exceeded congressional power. The decision in the *Civil Rights Cases* is to the same effect, noting that section 5 "cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be . . . to make Congress take the place of the State legislatures and to supersede them." 109 U.S. at 13.

The Court's voting rights decisions all point in the same direction. They each involved patterns and practices of unconstitutional State action, and therefore properly allowed Congress to impose calibrated extra-constitutional require-

ments on the States. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (law was enacted in response to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution," and prior remedies had been "unsuccessful"); *Katzenbach v. Morgan*, 384 U.S. at 653-54 (literacy test ban "was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications"); *Ex parte Virginia*, 100 U.S. 339 (permitting civil rights legislation applied to a State trial court judge who excluded jurors on account of race); *Oregon*, 400 U.S. at 131-34 (literacy tests) (Black, J., plurality opinion) (noting "long history" of discriminatory use of literacy tests); *id.* at 216-17 (Harlan, J., concurring) (sufficient evidence of racial discrimination with literacy tests); *id.* at 282-84 (Stewart, J., concurring, joined by Blackmun, J. and Burger, C.J.) ("nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country"); *City of Rome v. United States*, 446 U.S. 156 (1980) (same).

In contrast, a decision upholding the prophylactic exercise of section 5 power in the context of rational-basis scrutiny, with no widespread practice of relevant constitutional violations to boot, would break new ground and do little "to allay lingering concerns about the extent of the national power." *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). Such authority simply has no stopping point. Virtually any Federal law that is itself rational could fairly be said to curb the risk of irrational State lawmaking in the area. With respect to the "life, liberty and property" guarded by procedural due process, only self-restraint would stand in the way of the National government legislating a more appropriate "process" for State governments to follow. *Civil Rights Cases*, 109 U.S. at 13.

As for other rights incorporated through the due process clause, the risks may be even greater. What would prevent Congress from passing legislation regulating all encounters between State law enforcement and the citizenry in the name of protecting Fourth and Fifth Amendment rights? What would prevent property rights advocates from expanding this Court's "regulatory takings" case law? *See Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978). What would prevent Federal laws nationalizing a system of punishment in the name of protecting Eighth Amendment rights? And what would prevent the federalization of education, marriage and family laws in the name of protecting privacy and other substantive due process guarantees? Many questions linger here, and the answers to all of them counsel against accepting the invitation to start down this precipitous path.

CONCLUSION

For the foregoing reasons, the State of Alabama respectfully urges the Court to hold that the States retain the right to waive their immunity from suit under the ADA and that Congress has not permissibly abrogated it for them.

Respectfully submitted,

BILL PRYOR
Attorney General of Alabama
ALICE ANN BYRNE
MARGARET L. FLEMING
Assistant Attorneys General
State House
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

LISA HUGGINS
Office of Counsel
UNIVERSITY OF ALABAMA SYSTEM
AB 820, 1530 Third Ave. South
Birmingham, AL 35294-0108
(205) 934-3474

JEFFREY S. SUTTON
Counsel of Record
CHAD A. READLER
RONNELL A. JONES
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
Columbus, OH 43215
(614) 469-3855

GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioners

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APPENDIX

Appendix A

	ALABAMA	ALASKA
Prohibits employment discrimination based upon disability	Ala. Admin. Code r. 670-x-4-.01*	Alaska Stat. § 18.80.220
Applicable to the State and other public employers	Ala. Admin. Code r. 670-x-4-.01	§ 18.80.300(4), (16)
Applicable to the State pre-1990**	Ala. Admin. Code r. 670-x-4-.01 (1981)	§§ 18.80.220, 18.80.300(4), (16) (1975)
Equitable and monetary remedies available	Ala. Admin. Code r. 670-x-4-.03	§§ 22.10.020(i), 18.80.130
State policies advancing the hiring of persons with disabilities	Ala. Code § 21-7-8 (1975), § 21-5-1(1965), § 36-26-16	§§ 18.80.200 (1987), 23.15.220 (1960)
State policies requiring accessibility and accommodation	§§ 21-4-1 (1965), 21-7-2, 21-7-3 (1975)	§§ 35.10.015 (1966), 11.76.130 (1987), 18.80.230 (1965)
State policies favoring de-institutionalization	§§ 22-52-37 (a)(7) (1975), 38-9-6(c) (1977), 22-52-10.1 (1977)	§ 47.30.735(d) (1981)

*Applies to state employees only.

** Date indicated is the year the law both applied to the State and prohibited discrimination on the basis of disability.

	ARIZONA	ARKANSAS
Prohibits employment discrimination based upon disability	Ariz. Rev. Stat. § 41-1463.B1	Ark. Code § 16-123-107(a)(1); Exec. Order 93-1 (1993)
Applicable to the State and other public employers	§§ 41-1461.2, -1461.6	Exec. Order 93-1 (1993)
Applicable to the State pre-1990	§§ 41-1463.B1, 41-1461.2, -1461.6 (1985)	Exec. Order 86-1 (1985) (voluntary enforcement)
Equitable and monetary remedies available	§ 41-1481.D, .G	§§ 16-123-107(c), 19-10-208; Exec. Order 93-1 (1993)
State policies advancing the hiring of persons with disabilities	Exec. Order 89-7 (1989), 92-2 (1992)	§ 20-14-301(b) (1973); § 22-3-1303 (1969)
State policies requiring accessibility and accommodation	§§ 41-1492.01 (1967), 11-1024 (1965)	§§ 27-15-301, -306 (1985), 20-14-303 (1973)
State policies favoring de-institutionalization	§ 36-540.B (1983)	§ 20-47-214(c) (1979)

	CALIFORNIA	COLORADO
Prohibits employment discrimination based upon disability	Calif. Gov't Code § 12940(a)	Colo. Rev. Stat. § 24-34-402(1)(a)-(b)
Applicable to the State and other public employers	§ 12926(d)	§ 24-34-401(3)
Applicable to the State pre-1990	§§ 12940(a), 12926(d) (1973)	§§ 24-34-402(1)(a)-(b), 24-34-401(3) (1977)
Equitable and monetary remedies available	§ 12960; 22 Cal. 4th 147, 166-167 (2000)	§§ 24-34-306, 24-34-405
State policies advancing the hiring of persons with disabilities	§§ 19230, 19232 (1977); Calif. Educ. Code § 44100 (1977)	§§ 24-34-801 (1979), 26-8-105(d) (1963)
State policies requiring accessibility and accommodation	Gov't Code §§ 4450 (1968), 4450.5 (1984); Calif. Civ. Code §§ 54, 54.1 (1968), 51 (1905)	§§ 9-5-101 to -104 (1965), 24-34-801 (1971), 24-34-601 (1971)
State policies favoring de-institutionalization	Calif. Welf. & Inst. Code §§ 5354 (1967), 5325.1 (1978)	§§ 27-10-101 (1973), 27-10.5-101 (1975)

	CONNECTICUT*	DELAWARE
Prohibits employment discrimination based upon disability	Conn. Gen. Stat. § 46a-60(1)	Del. Code Title 19, § 724
Applicable to the State and other public employers	§§ 46a-51(10), 46a-69 to -78	§ 722(2)
Applicable to the State pre-1990	§§ 46a-60(1), 46a-51(10); former §§ 4-61c to 4-61k (1973)	§§ 724, 722(2) (1987)
Equitable and monetary remedies available	§ 46a-86(b)	§ 712(j),(k), and (g)
State policies advancing the hiring of persons with disabilities	§§ 46a-7 (1977), 46a-70(a) (1973), 31-136 (1957), 46a-70(b)-(c) (1973), 31-138 (1957)	Title 19 § 721 (1987); Title 16 § 9501(b) (1953)
State policies requiring accessibility and accommodation	§§ 29-269 (1967), 29-271 (1975); § 46a-64 (1973)	Title 29 §§ 7301 to 7306; Title 16 § 9502 (1971); Title 6 § 4504
State policies favoring de-institutionalization	§ 17a-498(c) (orig. § 17-178(c) (1976))	Title 16 § 5010 (1975)

*Conn. Const. Art. I, § 20 prohibits denial of equal protection of laws, discrimination and segregation based on physical or mental disability.

	FLORIDA	GEORGIA
Prohibits employment discrimination based upon disability	Fla. Stat. §§ 760.10, 110.105(2), 110.233(1)	Ga. Code §§ 34-6A-4, 45-19-29
Applicable to the State and other public employers	§§ 760.02(6)-(7), 110.233(1), 110.105(2) (1977)	§§ 34-6A-2(2), 45-19-22(5) (1978)
Applicable to the State pre-1990	§§ 110.105(2), 760.10, 760.02(6)-(7), 110.233(1) (1977)	§§ 34-6A-4, 34-6A-2(2), 45-19-29, 45-19-22(5) (1978)
Equitable and monetary remedies available	§§ 760.07, 760.11(5)	§§ 34-6A-6, 45-19-38
State policies advancing the hiring of persons with disabilities	§ 413.08(3) (1971), § 413.393(1)(i) (1994)	§ 30-1-2 (1975)
State policies requiring accessibility and accommodation	§ 553.503 (1974 (*see former* § 553.46)); § 413.08 (1949)	§§ 30-3-3 (1984), 30-4-1 (1955)
State policies favoring de-institutionalization	§ 394.467(1)(b) (1982)	§ 37-3-162(a) (*see also* § 88-502.4 (1978))

	HAWAII	IDAHO
Prohibits employment discrimination based upon disability	Haw. Rev. Stat. §§ 78-2, 378-2(1)(A)	Idaho Code § 67-5909(1)
Applicable to the State and other public employers	§ 78-2, 378-1	§ 67-5902(6)(b)
Applicable to the State pre-1990	§§ 378(2), 378-1, 78-2 (1980)	§§ 67-5909(1), 67-5902(6)(b) (1988)
Equitable and monetary remedies available	§ 378-5(b)	§§ 67-5907, 67-5908
State policies advancing the hiring of persons with disabilities	§§ 78-2 (1967)	§ 56-707(1) (1969)
State policies requiring accessibility and accommodation	§§ 103-50 (1965), 347-13 (1945), 489-3 (1986)	§§ 39-3201 to -3210 (1967), 56-702 (1969), 56-703 (1969)
State policies favoring de-institutionalization	§ 334-60.2(3) (orig. § 334-60 (1976))	§ 66-329(k)(2) (1981)

	ILLINOIS*	INDIANA
Prohibits employment discrimination based upon disability	775 Ill. Comp. Stat. §§ 5/1-103(Q), 5/2-102(A)	Ind. Code § 22-9-5-19
Applicable to the State and other public employers	§§ 5/1-103(L)	§§ 22-9-5-10, 22-9-5-15
Applicable to the State pre-1990	§§ 5/1-103(L), (Q) (1979)	§§ 22-9-1-3 (1975)
Equitable and monetary remedies available	§ 5/8A-104	§§ 22-9-1-6(l), 22-9-1-17
State policies advancing the hiring of persons with disabilities	§§ 30/5 (1969), 5/1-102(A) (1980), 5/1-102(F)-(G) (1980); 20 Ill. Comp. Stat. § 415/19a (1955), § 4007/1 (1992)	§§ 16-32-3-1 (1969), 16-32-3-5 (1969), 22-9-1-2 (1975), 4-15-12-2 (1977)
State policies requiring accessibility and accommodation	410 Ill. Comp. Stat. § 2511 (1985); 775 Ill. Comp. Stat. §§ 30/3 (1969), 5/5-102 (1986)	§§ 22-13-4-1(1) (1987), 16-32-3-1 (1969)
State policies favoring de-institutionalization	405 Ill. Comp. Stat. § 5/3-811 (1979)	§ 12-26-6-8 (orig. 16-14-9.1-9 (1975))

*Ill. Const. Art. I, § 19 prohibits employment discrimination against persons with physical or mental disabilities.

	IOWA	KANSAS
Prohibits employment discrimination based upon disability	Iowa Code § 216.6(1)(a)	Kan. Stat. § 44-1009(1)
Applicable to the State and other public employers	§ 216.2(7), (11)	§ 44-1002(b)
Applicable to the State pre-1990	§§ 216.2(7), (11), 216.6 (1)(a) (1972)	§§ 44-1002(b), 44-1009(1) (1974)
Equitable and monetary remedies available	§§ 216.15, 216.16	§§ 44-1011, 44-1005(k)
State policies advancing the hiring of persons with disabilities	§§ 216C.2 (1967), 216C.1 (1967), 19B.2 (1986), 19B.11 (1986)	§§ 39-1105 (1969), 44-1001 (1974)
State policies requiring accessibility and accommodation	§§ 104A (1965), 216C.3 (1959), 213C.1, 213C.4 (1967), 216.7 (1972)	§§ 58-1301 (1968), 39-1101 (1969), 44-1009(c) (1974)
State policies favoring de-institutionalization	§§ 229.14(3) (1975), 225C.14 (1981)	§ 59-2966 (orig. § 59-2917(f) (1976)); § 39-1603 (1990)

	KENTUCKY	LOUISIANA*
Prohibits employment discrimination based upon disability	Ky. Rev. Stat. §§ 207.150, 344.040	La. Rev. Stat. § 23:323(A)-(B)
Applicable to the State and other public employers	§§ 207.130 (1), (3); 344.010, 344.030(2)	§ 23:302(2)
Applicable to the State pre-1990	§§ 207.150, 207.130(1), (3) (1976)	§§ 46:2254(B)-(E), 46:2253 (1980)
Equitable and monetary remedies available	§§ 207.210(3), (4), 344.230, 344.240, 344.450	§ 23:303
State policies advancing the hiring of persons with disabilities	§§ 344.020(1) (b) (1992), 12.450 to 12.465 (1996)	§ 51:2231.A (1992)
State policies requiring accessibility and accommodation	§§ 198B.260 (1980), 258.500 (1966)	§§ 40:1731 to 1743 (1977), 46:1953 (1975), 49:146 (1987)
State policies favoring de-institutionalization	§ 202A.026 (1982)	§ 28:55.E(1) (1977)

*La. Const. Art. I, § 12 prohibits public accommodations and public areas from discriminating based on physical condition.

	MAINE	MARYLAND
Prohibits employment discrimination based upon disability	Me. Rev. Stat. Title 5 § 4572.1	Md. Ann. Code Art. 49B § 16
Applicable to the State and other public employers	§ 4553.4, .7	§§ 7, 15(b), 17A
Applicable to the State pre-1990	§§ 4572.1, 4553.4, .7 (1973)	§§ 7, 15(b), 16 (1974)
Equitable and monetary remedies available	§§ 4612, 4613	§ 11(e)
State policies advancing the hiring of persons with disabilities	Title 26 § 2006.5-C (1969)	Art. 30 § 33 (1966)
State policies requiring accessibility and accommodation	Title 5 §§ 4593 to 4595 (1973); Title 17 § 1312 (1971); Title 25 § 2701 (1967)	Md. Code Ann, State Fin. & Proc. § 2-509 (1985); Md. Ann. Code art. 83B § 6-102 (1974), art. 30 § 33 (1966), art. 49B § 5 (1974)
State policies favoring de-institutionalization	Title 34-B § 3864.5.E(2) (1983)	Md. Health-Gen. § 10-632 (e)(2)(v) (1982)

	MASSACHUSETTS*	MICHIGAN
Prohibits employment discrimination based upon disability	Mass. Gen. Laws ch. 151B § 4(16)	Mich. Comp. Laws §§ 37.1102, 37.1202
Applicable to the State and other public employers	§ 1(5)	§§ 37.1103(g), 37.1201(b)
Applicable to the State pre-1990	§§ 1(5), 4(16) (1983)	§§ 37.1102, 37.1103(g), 37.1202 (1976)
Equitable and monetary remedies available	§§ 5, 6	§§ 37.1606, 37.2605
State policies advancing the hiring of persons with disabilities	ch. 6 § 105-106 (1958)	Exec. Order No. 1994-16 (May 23, 1994)
State policies requiring accessibility and accommodation	ch. 22 § 13A (1967); ch. 143 § 3W (1973); ch. 272 §§ 92A, 98 (1975)	§§ 125.1351 to 1356 (1966), 37.1302 (1976), 37.1102 (1976)
State policies favoring de-institutionalization	ch. 123 § 8 (1978)	§ 330.1469a (1974)

*Mass. Const. Amendment Art. 114 prohibits discrimination against persons with disabilities in a program or activity within the Commonwealth.

	MINNESOTA	MISSISSIPPI
Prohibits employment discrimination based upon disability	Minn. Stat. § 363.03	Miss. Code § 25-9-149*
Applicable to the State and other public employers	§ 363.01(17), (28)	§ 25-9-149
Applicable to the State pre-1990	§§ 363.03, 363.01 (1973)	§ 25-9-149 (1984)
Equitable and monetary remedies available	§ 363.071	§§ 25-9-131, 25-9-132
State policies advancing the hiring of persons with disabilities	§ 256C.01 (1969), § 116J.874	§ 43-6-15 (1974)
State policies requiring accessibility and accommodation	§§ 471.465 to .468 (1971), 256C.02 (1969), 363.03 (1975)	§§ 43-6-101 to -124 (1972), 43-6-5 (1972)
State policies favoring de-institutionalization	§ 253B.09 (1982)	§ 41-21-73(4) (orig. § 41-21-75 (1975))

*Only applicable to persons seeking public employment.

	MISSOURI	MONTANA
Prohibits employment discrimination based upon disability	Mo. Rev. Stat. § 213.055(1)	Mont. Code §§ 49-2-303, 49-4-101, 49-3-201
Applicable to the State and other public employers	§ 213.010(7)	§ 49-3-201
Applicable to the State pre-1990	§§ 213.010(7), 213.055(1) (1978)	§ 49-3-201 (1975)
Equitable and monetary remedies available	§ 213.076	§§ 49-2-506(b), 49-4-102, 49-3-309(b)
State policies advancing the hiring of persons with disabilities	§§ 209.180 (1977), 286.200 (1977)	§§ 49-4-202 (1971), 49-3-202 (1975), 39-30-101 to 102, -106 (1983); Mont. Admin. R. §§ 2.21.1412 to .1414 (1984)
State policies requiring accessibility and accommodation	§§ 8.610 to .657 (1967), 209.150 (1941), 213.065 (1986)	Mont. Code §§ 50-60-201(4) (1969), 49-4-211 (1971), 49-2-304 (1974)
State policies favoring de-institutionalization	§ 632.335.4 (1980)	§ 53-21-127 (1975)

	NEBRASKA	NEVADA
Prohibits employment discrimination based upon disability	Neb. Rev. Stat. §§ 48-1104, 48-1107.02	Nev. Rev. Stat. §§ 281.370, 613.330
Applicable to the State and other public employers	§§ 48-1102(2), 48-1126	§§ 281.370, 613.310(2), (5)
Applicable to the State pre-1990	§§ 48-1104, 48-1102(2) (1979)	§§ 281.370, 613.330, 613.310(2), (5) (1971)
Equitable and monetary remedies available	§ 48-1119(4)	§§ 613.405, 613.420, 613.430, 233.170, 233.180
State policies advancing the hiring of persons with disabilities	§ 20-131 (1971)	§ 284.012 (1969)
State policies requiring accessibility and accommodation	§§ 81-5,147 (1974), 20-127 (1971), 20-129 (1971)	§§ 338.180 (1973), 651.070 (1969)
State policies favoring de-institutionalization	§ 83-1037 (1976)	§ 433A.310.3 (1975)

	NEW HAMPSHIRE	NEW JERSEY
Prohibits employment discrimination based upon disability	N.H. Rev. Stat. § 354-A:7	N.J. Stat. Title 10 §§ 5-4.1, 5-12, 5-29.1
Applicable to the State and other public employers	§ 354-A:2(VII)	§ 5-5.e
Applicable to the State pre-1990	§§ 354-A:2, 354-A:7 (1975)	§§ 5-4.1, 5-12, 5-29.1 (1972)
Equitable and monetary remedies available	§ 354-A:22	§ 5-13
State policies advancing the hiring of persons with disabilities	§ 167-C:5 (1971)	§§ 30:6-17 (1964), 30:6-23 (1982), 11A:7-1 (1986)
State policies requiring accessibility and accommodation	§§ 275-C:14 (1977), 167-C:2 (1971), 155:39-b (1990)	§§ 52:32-4 to -5 (1971), 10:5-4 (1972), 10:5-29 (1971)
State policies favoring de-institutionalization	§§ 135-C:57 (1986), 135C:40(v) (1975)	§§ 30:4-24.2(e) (1975), 30:4-27.11(e)(b) (1991), 30:6D-9 (1977)

	NEW MEXICO	NEW YORK
Prohibits employment discrimination based upon disability	N.M. Stat. § 28-1-7	N.Y. Exec. Law § 296; N.Y. Civ. Serv. Law § 55
Applicable to the State and other public employers	§ 28-1-2.A to .B	N.Y. Exec. Law § 292;* N.Y. Civ. Serv. Law § 55
Applicable to the State pre-1990	§§ 28-1-7, 28-1-2.A to .B (1973)	N.Y. Exec. Law §§ 292, 296; N.Y. Civ. Serv. Law § 55 (1974)
Equitable and monetary remedies available	§ 28-1-10.J	N.Y. Exec. Law § 297(4)(c), (6), (9)
State policies advancing the hiring of persons with disabilities	§§ 28-7-7 (1967), 28-10-11 (1969), 28-10-1, 28-10-2 (1973)	N.Y. Ct. Rules § 25.16 L. 1988 c. 261 § 62 (1988); N.Y. Civ. Serv. Law § 55-b (1977)

**See Matter of Bd. of Higher Educ. v. Carter*, 14 N.Y.2d 138, 147 (1964).

	NEW MEXICO	NEW YORK
State policies requiring accessibility and accommodation	§§ 60-13-44(D) (1967), 28-7-3 (1967), 28-1-7(F) (1973)	N.Y. Pub. Bldgs. Law §§ 50, 51 (1972); N.Y. Exec. Law § 296(2) and (2-a) (1974); N.Y. Civ. Rights Law § 47 (1976)
State policies favoring de-institutionalization	§ 43-1-11(c)(3) (1977)	N.Y. Mental Hygiene Law § 9.27(d) (orig. § 31.27) (1972)

	NORTH CAROLINA	NORTH DAKOTA
Prohibits employment discrimination based upon disability	N.C. Gen. Stat. §§ 126-16, 168A-5	N.D. Cent. Code § 14-02.4-03
Applicable to the State and other public employers	§§ 126-16, 168A-3(2),(7)	§§ 14-02.4-02.6, 14-02.4-02.11
Applicable to the State pre-1990	§§ 168A-3(2),(7), 168A-5 (1985)	§§ 14-02.4-03, 14-02.4-02.6 (1983)
Equitable and monetary remedies available	§§ 126-37, 168A-11	§§ 14-02.4-19 to -20
State policies advancing the hiring of persons with disabilities	§§ 143-422.2 (1977), 128-15.3 (1971), 168A-2 (1985), 128-15.3 (1971), 143B-403.1 to 403.2 (1977)	§ 25-13-05 (1967)
State policies requiring accessibility and accommodation	§§ 168-2 (1973), 168-3 (1973), 168A-6 (1985)	§§ 14-02.4-14 (1983), 25-13-02 (1967), 48-02-19 (1973)
State policies favoring de-institutionalization	§ 122C-271 (1973)	§ 25-03.1-17 (1977)

	OHIO	OKLAHOMA
Prohibits employment discrimination based upon disability	Ohio Rev. Code § 4112.02	Okla. Stat. Title 25 § 1302, 74 § 840-2.9.A
Applicable to the State and other public employers	§§ 4112.01(A) (1)-(2)	25 § 1301.1; 74 § 840-2.9.A
Applicable to the State pre-1990	§ 4112.01, .02 (1976)	25 §§ 1301.1, 1302; 74 § 840-2.9.A (1981)
Equitable and monetary remedies available	§ 4112.02(N)	25 § 1901
State policies advancing the hiring of persons with disabilities	§§ 3304.38 (1996), 124.231(C) (1978)	74 § 9.30 (1957)
State policies requiring accessibility and accommodation	§§ 3781.111 (1965), 4112.02 (1976)	61 § 11 (1965); 7 § 19.1 (1968); 25 § 1402 (1985)
State policies favoring de-institutionalization	§ 5122.15(E) (1977)	43A, § 5-416 (orig 54.9(A), § 405(B)(1) (1980))

	OREGON	PENNSYL-VANIA
Prohibits employment discrimination based upon disability	Or. Rev. Stat. § 659.436	43 Pa. Cons. Stat. § 955
Applicable to the State and other public employers	§§ 659.400(4), 659.010(6)	§ 954(b)
Applicable to the State pre-1990	§ 659.425 (renumbered in 1997) (1973)	§§ 955, 954(b) (1974)
Equitable and monetary remedies available	§§ 659.050 to .070	§§ 962(c), 959
State policies advancing the hiring of persons with disabilities	§§ 182.100 (1981), 410.710 (1989), 659.020 (1983), 659.025(2) (1981), 659.405 (1973)	§ 952 (1974), 62 Pa. Cons. Stat. § 3207(d) (1994)
State policies requiring accessibility and accommodation	§§ 447.210 to 310 (1971), 346.610 to 660 (1967), 659.425(3) (1973)	71 Pa. Cons. Stat. §§ 1455.1 to 1455.3b (1965); 43 Pa. Cons. Stat. § 955(i) (1974)
State policies favoring de-institutionalization	§§ 427.031 (1979), 427.007 (1981)	50 § 7304(f) (1976)

	RHODE ISLAND*	SOUTH CAROLINA
Prohibits employment discrimination based upon disability	R.I. Gen. Laws §§ 28-5-7, 36-4-50	S.C. Code §§ 1-13-80(A), 1-13-85
Applicable to the State and other public employers	§§ 28-5-6(6)(i), 36-4-50	§§ 1-13-30 (d),(e)
Applicable to the State pre-1990	§§ 28-5-7, 28-5-6(6)(i) (1973)	§§ 1-13-80(A), 1-13-30(d)-(e) (1983)
Equitable and monetary remedies available	§ 28-5-24	§§ 1-13-90(c)(16), 1-13-90(d)(9)
State policies advancing the hiring of persons with disabilities	§§ 28-5.1-9 (1988), 25-2-13 (1971), 42-51-1 to 42-51-10 (1970)	§ 43-33-60 (1962)
State policies requiring accessibility and accommodation	§§ 37-8-15 (1964), 40-9.1-1 (1975), 42-87-2 (1983)	§§ 10-5-250 to 10-5-320 (1962), 10-5-330 (1983), 43-33-20 (1962), 43-33-10 (1962), 43-33-530 (1983)
State policies favoring de-institutionalization	§ 40.1-5-8(j) (orig. § 40.1-5-8(10)) (1974)	§§ 44-20-20 (1990), 44-20-390 (1990)

*R.I. Const. Art. I, § 2 prohibits State entities and those doing business in the State from discriminating against an otherwise qualified person solely based on disability.

	SOUTH DAKOTA	TENNESSEE
Prohibits employment discrimination based upon disability	S.D. Laws Codified §§ 20-13-10, 20-13-23.7, 20-13-10.1, 3-6A-15	Tenn. Code § 8-50-103(a)
Applicable to the State and other public employers	§§ 20-13-1(7), (11), 3-6A-15	§ 8-50-103(a)
Applicable to the State pre-1990	§§ 20-13-10, 20-13-1(7) (1986)	§ 8-50-103(a) (1976)
Equitable and monetary remedies available	§ 20-13-35.1	§§ 4-21-311, 8-50-103(b)(2)
State policies advancing the hiring of persons with disabilities	§§ 20-13-23.7 (1986), 60-7-2 (1967)	§§ 71-4-202 (1972), 8-50-104 (1976)
State policies requiring accessibility and accommodation	§§ 5-14-12 to 14 (1965), 9-46-1.2 (1975), 20-13-23.2 (1976), 20-13-23 (1986)	§§ 68-120-201 to 205 (1970), 62-7-112 (1955)
State policies favoring de-institutionalization	§ 27A-10-9.1 (1991); *former* §§ 27A-9-16.1 (1981), 27A-12-3.6 (1975)	§ 33-6-104(b) (orig. § 33-604(a)) (1976)

	TEXAS	UTAH
Prohibits employment discrimination based upon disability	Tex. Lab. Code § 21.051	Utah Code § 34A-5-106
Applicable to the State and other public employers	§ 21.002(8)(D)	§ 34A-5-102(8)(a)
Applicable to the State pre-1990	§§ 21.051, 21.002 (1983)	§§ 34A-5-102, 34A-5-106 (1979)
Equitable and monetary remedies available	§ 21.258	§ 34A-5-107(A)
State policies advancing the hiring of persons with disabilities	Tex. Hum. Res. §§ 122.001 (1975),121.003, 121.001 (1979)	§§ 26-30-3 (1981), 53A-24-114 (1995)
State policies requiring accessibility and accommodation	Rev. Civ. Stat. Ann. art. 9102 (1979); Hum. Res. Code § 121.003 (1979)	§§ 26-29-1 to 4 (1981), 26-30-1 (1981)
State policies favoring de-institutionalization	Tex. Health & Safety Code § 574.036(d) (1983)	§ 62A-12-234(10)(d) (orig § 64-7-36(10)(d)) (1975)

	VERMONT	VIRGINIA
Prohibits employment discrimination based upon disability	Vt. Stat. 21 § 495(a)(1)	Va. Code §§ 51.5-41.A, 2.1-716, 2.1-116.06
Applicable to the State and other public employers	§ 495d(1)	§§ 51.5-41.A, 2.1-116.06
Applicable to the State pre-1990	§§ 495, 495d (1981)	§§ 51.5-41.A, 2.1-716 (1985)
Equitable and monetary remedies available	§ 495b(b)	§§ 51.5-46, 2.1-116.07.B
State policies advancing the hiring of persons with disabilities	Title 21 §§ 497 (1963), 497a (1963)	§§ 2.1-715 (1987), 2.1-116.10 (1979), 51.5-41.B (1972), 2.1-116.14 (1979)
State policies requiring accessibility and accommodation	Title 21 §§ 273-276 (1987); Title 9 § 4502 (b)-(c) (1987)	§§ 2.1-516 (1970), 51.5-44 (1972); 2.1-715 (1987)
State policies favoring de-institutionalization	Title 18 § 7617(c) (1977)	§ 37.1-67.3 (1976)

	WASHINGTON	WEST VIRGINIA
Prohibits employment discrimination based upon disability	Wash. Rev. Code § 49.60.180	W.Va. Code § 5-11-9
Applicable to the State and other public employers	§ 49.60.040(1), (3)	§ 5-11-3(d)
Applicable to the State pre-1990	§§ 49.60.180, 49.60.040(1), (3) (1973)	§§ 5-11-9, 5-11-3(d) (1973)
Equitable and monetary remedies available	§ 49.60.250	§§ 5-11-13(b), (c)
State policies advancing the hiring of persons with disabilities	§§ 70.84.080 (1969), 70.84.010 (1969), 49.60.010 (1973), 50.12.250 (1987)	§§ 5-15-7 (1969), 5A-3A-1 (1990)
State policies requiring accessibility and accommodation	§§ 19.27.031(5) (1985), 70.92.110 (1975), 70.84.010 (1969)	§§ 5-11-2 (1981), 5-15-4 (1969), 5-11-9(6) (1973)
State policies favoring de-institutionalization	§§ 71.05.320 (1973), 17.24.015 (1989)	§§ 27-5-3(a) (1979), 7-5-4(j)(2) (1979)

	WISCONSIN	WYOMING
Prohibits employment discrimination based upon disability	Wis. Stat. §§ 111.321-.322, 111.34	Wyo. Stat. § 27-9-105(a)
Applicable to the State and other public employers	§ 111.32(6)(a)	§ 27-9-102(b)
Applicable to the State pre-1990	§§ 111.321-.322, 111.32(6)(a), 111.34 (1965)	§§ 27-9-102(b), 27-9-105(a) (1985)
Equitable and monetary remedies available	§ 111.39(c)	§ 27-9-106(g)
State policies advancing the hiring of persons with disabilities	§ 230.01(2) (1977); 1989 Act 345 § 1 (1989); Wis. Admin. Code ER-MRS 27.03(1), 27.04(1), 27.05(1) (1988)	§§ 27-1-110 to -111(1967), 9-2-115 (1965)
State policies requiring accessibility and accommodation	§§ 101.13 (1963), 346.503 (1981), 174.056 (1967)	§§ 16-6-501 to 504 (1969), 35-13-201 (1967)
State policies favoring de-institutionalization	§ 51.20(13)(c) (1975)	§ 25-10-110(j) (1981)

Appendix B

Current Alabama Programs, Laws and Policies To Promote, Assist and Protect Persons with Disabilities

POLICIES FAVORING EMPLOYMENT OF PERSONS WITH DISABILITIES

- "It is the policy of [the State of Alabama] to encourage and enable the blind, the visually handicapped and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment." Act of Oct. 7, 1975, No. 869, § 1, 1975 Ala. Acts 1711, 1711, codified at ALA. CODE § 21-7-1 (1997); *see generally* ALA. CODE §§ 21-7-1 to 10 (1997).

- Alabama residents with disabilities are entitled to preferential treatment in hiring for State employment under the State Merit System. Act of Sept. 30, 1965, No. 119, 1965 Ala. Acts., 2d Ex. Sess. 166, codified at ALA. CODE § 36-26-16 (1991).

- Equitable and monetary remedies are available to persons with disabilities in the state service who experience employment discrimination. ALA. ADMIN. CODE r. 670-x-4-.01, .03 (1981).

- The Governor's Committee on Employment of the Handicapped promotes "the employment of the physically mentally, emotionally, and otherwise handicapped citizens of Alabama." Act of Aug. 10, 1965, No. 226, §1, 1965 Ala. Acts 323, 323, codified at ALA. CODE § 21-5-1 (1975); *see generally* ALA. CODE §§ 21-5-1 to 10 (1997) (establishing duties, composition, and authority of Committee).

- It is the public policy of the State of Alabama to employ

persons with disabilities in the state service, including state agencies and departments, "on the same terms and conditions as the able-bodied." ALA. CODE § 21-7-8 (1997).

- A blind-vendor program gives preference to blind persons for the operation of vending stands in all state-owned or leased properties. *See* ALA. CODE §§ 21-1-40 to 41 (1997).

- It is the policy of the University of Alabama at Birmingham to recruit, hire, and promote all faculty and staff without regard to race, color, religion, sex, national origin, disability unrelated to job performance, disabled veteran status, or Vietnam era veteran status. Office of Human Resource Management, University of Ala. at Birmingham, *Equal Opportunity Policy* (Aug. 2, 1993, rev. Jan. 31, 1996 & Nov. 17, 1999).

- It is the policy of the University of Alabama at Birmingham to "make[] an affirmative effort to hire individuals with disabilities." *See* Office of Human Resource Management, University of Ala. at Birmingham, *Policy 126: Hiring Individuals with Disabilities* (Issued Oct. 1980, rev. Mar. 1999).

- The University has a detailed grievance procedure for non-faculty employees. Office of Human Resource Management, University of Ala. at Birmingham, *Policy 608: Grievance Procedure for Nonfaculty Employees* (Issued Nov. 1980, rev. Aug. 1997).

PROGRAMS TO ASSIST PERSONS WITH DISABILITIES IN OBTAINING EMPLOYMENT

- The Alabama Department of Vocational Rehabilitation Services (VRS) provides employment-related services to adolescents and adults with disabilities through

partnerships with local school systems, colleges and universities, junior colleges, vocational technical schools and community rehabilitation programs. *See* ALA. CODE §§ 21-9-1 to 13 (1997).

- A state office staffed by a full-time attorney provides toll-free information to the public on the rights of the disabled and assists disabled persons by making referrals, providing public education and training, and collecting and analyzing statistical data. *See* ALA. CODE § 21-9-14 (Supp. 1999).
- Alabama Department of Rehabilitation Services (DRS) provides disability management and employee placement services for persons with disabilities. *See* ALA. CODE §§ 21-9-1 to 13 (1997).
- The Department of Adult Blind and Deaf, a division of the Alabama Institute of the Deaf and Blind (AIDB), assists adults with vision and hearing impairment. *See* ALA. CODE § 21-1-15 (1997).
- Home Industries for the Blind, a division of AIDB, creates employment opportunity for persons with sight impairment. *See* ALA. CODE §§ 21-2-1 to 4 (1997).

PUBLIC ACCOMMODATIONS FOR PERSONS WITH DISABILITIES

- All public buildings and facilities must be accessible to persons with disabilities. Act of Aug. 9, 1965, No. 224, 1965 Ala. Acts 315, codified as amended at ALA. CODE § 21-4-1 (1997).
- Disabled persons have equal rights to use streets, sidewalks, public buildings and public facilities. ALA. CODE § 21-7-2 (1997).
- Persons with disabilities are "entitled to full and equal accommodations, advantages, facilities and privileges"

with regard to public transportation, lodging, public accommodation, amusement, resorts, "and other places to which the general public is invited." ALA. CODE § 21-7-3 (1997).

- Disabled persons have access to housing accommodations. ALA. CODE § 21-7-9 (1997).
- It is a criminal offense to interfere with the statutory rights of disabled persons. ALA. CODE § 21-7-5 (1997).
- Alabama has a rehabilitation program for disabled persons who are homebound, providing medical care, adjustment training, attendant care, prosthetic appliances, home health care, home modifications, transportation and medical supplies. *See* ALA. CODE §§ 21-6-1 to 5 (1997).

EDUCATIONAL OPPORTUNITIES FOR PERSONS WITH DISABILITIES

- DRS offers an early intervention system for infants and toddlers with disabilities. *See* ALA. CODE §§ 21-3A-1, 21-9-2(3)(b) (1997).
- DRS provides services for children with special health-care needs from birth to age 21 and their families. *See* ALA. CODE §§ 21-3-1, 21-9-2(3)(a) (1997).
- DRS provides assistance to teachers, local school systems, and school nurses in the education of children with special health-care needs. *See* ALA. CODE §§ 21-3-1, 21-9-2(3)(a) (1997).
- DRS provides rehabilitation and education services to adolescents and adults with disabilities through partnerships with local school systems, colleges and universities, junior colleges, vocational technical schools and community rehabilitation programs. *See* ALA. CODE §§ 21-9-1 to 13 (1997).

- DRS provides assistance to children and adults with hemophilia. *See* ALA. CODE §§ 21-3-1, 21-9-2(3)(a) (1997).

- DRS offers State of Alabama Independent Living (SAIL) Service to persons with severe spinal cord or head injuries. *See* ALA. CODE §§ 21-6-1 to 5 (1997).

- "Today, Alabama Institute for Deaf and Blind (AIDB) is the nation's most comprehensive education and service program for individuals who are sensory impaired, serving more than 3,000 people and their families each year." Lynne Hanner, *AIDB Celebrates 140 Years . . . and a Passion for Service*, Sights & Sounds: The Magazine of Alabama Institute for Deaf and Blind, November 1998, at 4. One *Wall Street Journal* article described the AIDB's work as "a striking example of how disabilities can be overcome." Tony Horwitz, *Talladega, Ala., Is a User-Friendly City for Disabled People*, Wall St. J., Feb. 14, 1994, at A1.

- The Alabama School for the Deaf, a part of the Alabama Institute for the Deaf and Blind (AIDB), provides educational opportunities for persons with hearing impairment. Robert Hill Couch & Jack Hawkins, Jr., *Out of Silence and Darkness: The History of the Alabama Institute for Deaf and Blind 1858-1983* 21-32 (1983); *see* Act of Jan. 27, 1860, No. 253, 1859-60 Ala. Acts 344; ALA. CODE § 21-1-1 (1997).

- The Alabama Academy for the Blind, a part of AIDB, provides educational opportunities for blind persons. *See* Act of Feb. 18, 1867, No. 490, 1866-67 Ala. Acts 550; ALA. CODE § 21-1-1 (1997).

- The Helen Keller School of Alabama, a division of AIDB, provides education for children with both sight and hearing impairments. *See* Couch & Hawkins, *supra*, at 178-79.

DEINSTITUTIONALIZATION OF PERSONS WITH MENTAL ILLNESS

- Since 1975, commitment requires a judicial determination that "commitment or recommitment is the least restrictive alternative necessary and available for treatment of the person's illness." *See* Act of Oct. 10, 1975, No. 1228, § 8, 1975 Ala. Acts 2576 (codified at ALA. CODE § 22-52-37(7)(e) (1997)).

- In hearings on petitions for involuntary commitment, "[t]he least restrictive alternative necessary and available for the treatment of the respondent's mental illness shall be ordered." ALA. CODE § 22-52-10.1(a) (1997).

- When petitioned to order protective placement or other protective services, the court "shall give preference in making a determination to the least drastic alternative considered to be proper under the circumstances, including a preference for noninstitutional care whenever possible." Act of May 23, 1977, No. 780, § 4, 1977 Ala. Acts 1340 (codified at ALA. CODE § 38-9-6(c) (1992)).

Appendix C

Examples of Federal Disability Laws Applicable to State Recipients of Federal Funding

Section 504 of the Rehabilitation Act (29 U.S.C. § 794)

- Prohibits discrimination on the basis of disability with respect to employment and access to government services, programs and activities.
- Applies to State recipients of Federal funding.

Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.)

- Aims to assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services.
- Requires States receiving assistance under the Act to provide numerous procedural safeguards for children and their parents or guardians.

Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. § 6001 et seq.)

- Creates a Bill of Rights for persons with developmental disabilities, covering such matters as excessive use of chemical and physical constraints, visitation of parents, and provision of adequate medical care and nutrition.
- Provides Federal financial assistance to States through basic support formula grants to establish systems for the protection of developmentally disabled persons and their

rights. A State accepting funding must abide by the Act's requirements.

Architectural Barriers Act of 1968 (42 U.S.C. § 4151 et seq.)

- Sets forth standards of accessibility for the design and construction of newly constructed and altered buildings.
- Applies to the design and construction of any State building or project financed in whole or in part by a Federal grant or loan.

Appendix D

Americans With Disabilities Act
Title I

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and

criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

42 U.S.C. § 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or

interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

> **(B)** denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

42 U.S.C. § 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations,

including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

42 U.S.C. § 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

42 U.S.C. § 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

42 U.S.C. § 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that

avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

* * *

Americans With Disabilities Act
Title II

Part A

42 U.S.C. § 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C. § 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

* * *

42 U.S.C. § 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[1] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

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[1] So in original. Probably should be "in a."

Code of Federal Regulations

Title 28—Judicial Administration

Chapter I—Department of Justice

Part 35—Nondiscrimination on the basis of disability in state and local government services

Subpart B—General Requirements

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with

disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless

such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.